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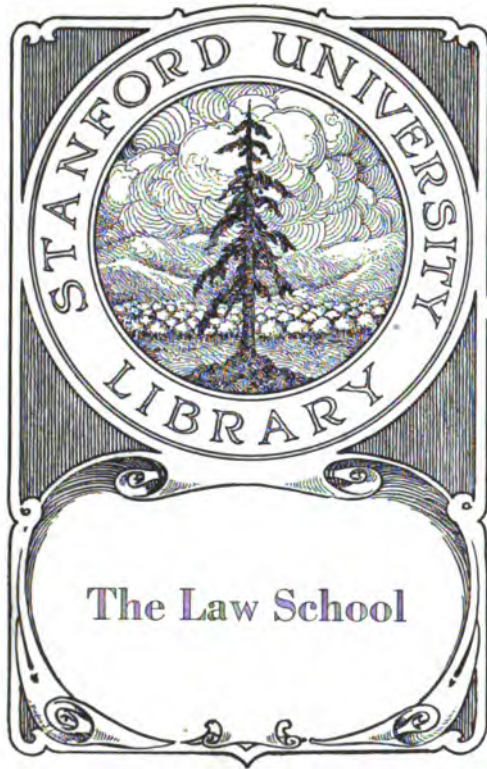
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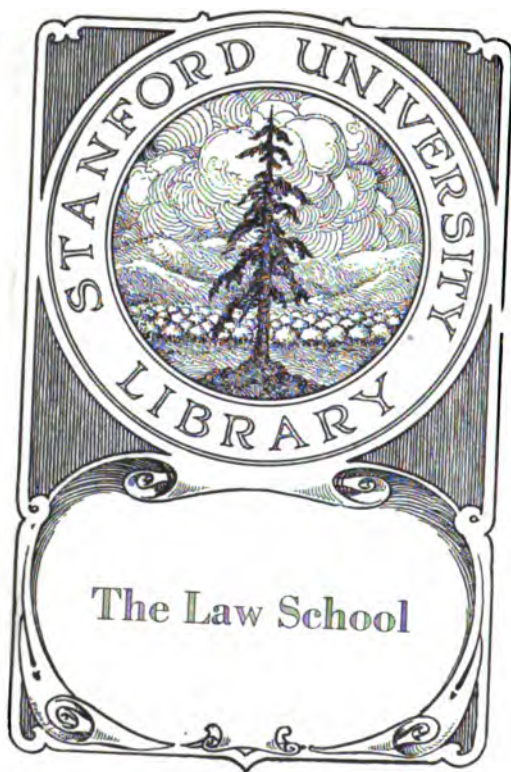
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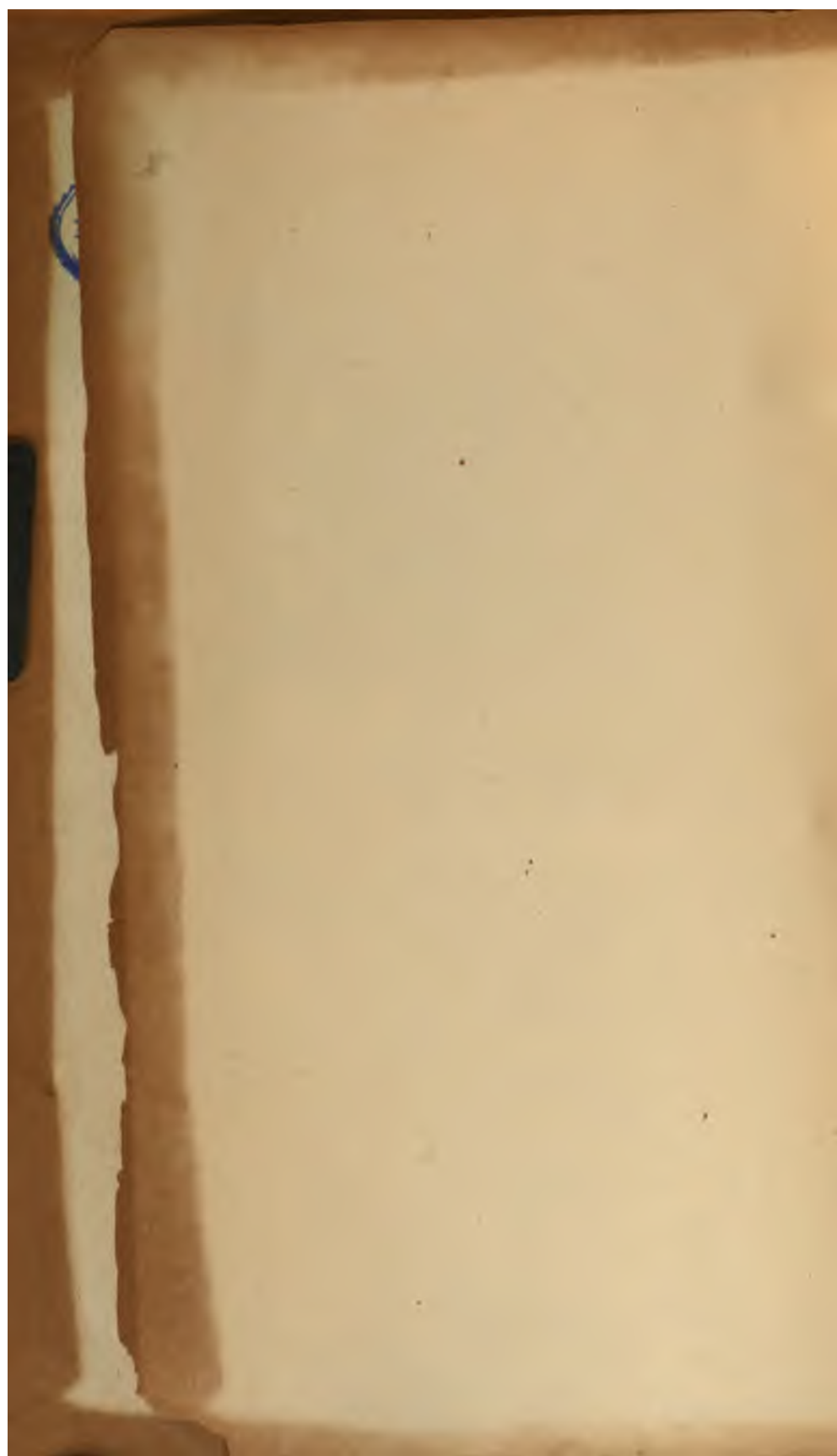


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REPORTS OF CASES
ADJUDGED IN THE
SUPREME COURT

—OF—

PENNSYLVANIA:

WITH SOME SELECT CASES

AT

NISI PRIUS, AND IN THE CIRCUIT COURTS.

BY THE HON. JASPER YEATES,

ONE OF THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA.

VOL. I.

PHILADELPHIA:

JOHN CAMPBELL,

LAW BOOKSELLER, PUBLISHER AND IMPORTER,

No. 740 Sansom Street.

1871.

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NOTES TO CASES OVERRULED, AFFIRMED OR MODIFIED.

[Prepared by WM. DUANE, Esq., of the Philadelphia Bar.]

Douglass's Lessee vs. Sanderson, 15.

See *Hyam vs. Edwards*, 1 Dallas, 2, and *Kingston vs. Leslie*, 10 Sergeant and Rawle, 383.

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See 4 Yeates, 281: "The case of *Hurst's Lessee vs. Kirkbride*, has led to error." *Heagy vs. Umberger*, 10 S. and R. 342.

Eichelberger vs. Barnitz, 307.

"It is scarcely to be reconciled with the governing doctrine, as that has been more distinctly developed by modern adjudications." *Beeson vs. Beeson*, 9 Barr, 285.

Stouffer vs. Coleman, 393.

"I can hardly believe it accurately reported." *Gibson, J. in Kauffelt and others vs. Bower*, 7 S. and R., 75.

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ADVERTISEMENT.

The following reports are faithfully printed from the manuscript of the learned and venerable author. He had prepared them for the press, and had completed the index and marginal notes ; which has enabled the publisher, to whom he bequeathed them, to give them to the profession without delay. It is presumed they will be considered as a valuable acquisition to the library of the lawyer. The industry and abilities, as well as the accuracy and fidelity of the author were well known to the gentlemen of the bar, by whom he had the happiness to be highly esteemed.

It is intended to close these reports at the period at which the valuable reports of MR. BINNEY commence ; they will, therefore, connect the series of reports from the first volume of MR. DALLAS's reports to the present time.

Some few cases will be found in the first volume which are also contained in MR. DALLAS's second and fourth volumes ; but it is only in such cases in which the reports appeared to be more full and satisfactory, and it was presumed the re-publication of them, in those cases, would be acceptable to the profession generally.

CHARLES SMITH.

Philadelphia, Nov. 1st, 1817.

NOTICE FROM THE PUBLISHER OF THIS RE-PRINT.

The Vol. I. of YEATES, from which this is re-printed, has the name of WM. RAWLE, 1817, written on the title page, and was evidently, at one time, the property of that gentleman. In the same handwriting there are various notes throughout the book, which we place in brackets at bottom of pages where they occur.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1791.

Present: M'KEAN, CHIEF JUSTICE.—ATTLEE, SHIPPEN, AND YEATES, JUSTICES

Lessee of EZEKIEL THOMAS *et al.* vs. JAS. CUMMINS.

Attachment awarded for contemptuous expressions of the Court, without granting a rule to show cause.

MR. SERGEANT *pro quer.* moved for a rule to show cause on the defendant why an attachment should not issue against him, upon an affidavit that a writ of estrepement had been served on him in this cause, and that he had afterwards declared he would go on committing waste, notwithstanding the power of the justices, sheriff, &c.

The Court declared that they need not, in such case, give a rule to show cause, but upon such highly improper expressions, would grant the attachment in the first instance, the defendant having set at naught the powers of the Court: And the attachment was awarded accordingly to the sheriff of Chester county, where the ejectment was commenced.

JOHN McKISSON vs. THOMAS STEEL *et al.*

Full cause in trespass may be given by a jury, though damages are found under 500*l.*

Motion to show cause why the plaintiff should have full costs, comes too late after judgment and execution.

THIS cause was removed by the plaintiff and tried at the last assizes in York county, and the jury, in an action of trespass and false imprisonment, had given a verdict for 37*l.* 10*s.* damages and full costs. Judgment *nisi* had been entered thereon at the last term, and execution had issued for the damages and full costs. Mr. Sergeant *pro def.* moved for a rule to show cause why the plaintiff should have his full costs, inasmuch as the same was mere matter of law, and the generality of the judgment as entered could not indicate the opinion of the Court thereupon; but the Court refused the motion, as he came too

late, and might, with equal propriety, desire an argument several years hence. The chief justice further said, the jury had found their verdict in conformity to the particular direction of himself and Mr. Justice Bryan on the trial.

Lessee of JOHN PENN jr., *et al.* vs. MICHAEL MESSINGER *et al.*

Supreme Court will not punish a contempt offered to the process of another Court.

THESE ejectments had been removed by the plaintiffs from the Common Pleas of Northampton county, and writs of estrepement had been issued in pursuance of rules in that Court, and served on the parties. Mr. Sitgreaves, for the plaintiffs, moved for a rule on the defendants, to show cause why attachment should not issue against them, for a contempt in disobeying the process of the inferior Court, the whole record being removed by *certiorari*. But the Court refused to grant the rule. They said they knew of no case where one Court punished a contempt offered to another Court, and would not carry the system of punishing by attachments further than they were clearly warranted by practise and adjudged cases.

RESPUBLICA vs. WM. COATES, Esq.

A bond may be declared on as lost by time and accident without a *profert*.

THIS was an action of debt on bond brought against the defendant as surety of William Dewees, Esq., formerly sheriff of Philadelphia county. It had been tried on a plea of *non est factum* two years before, and a juror had been withdrawn by consent, the original obligation being lost.

Mr. Moses Levy, *pro quer.*, had moved on the first day of this term, on proof being made of the obligation being lost, for a rule on the defendant to show cause why the declaration should not be amended by striking out the *profert* therein, and averring the loss of the obligation on which, &c., and a rule had been granted accordingly to show cause on the 8th of April. Messrs. Lewis and Sergeant now attended for the defendant, but declared they would not object to the rule being made absolute, though they considered it a hard case on the defendant, as they apprehended the late authority in 3 Term Rep. 151, had settled the practise of the Courts of law in England.

The rule to show cause was accordingly made absolute, the Court declaring that it was absolutely necessary such practise

should be adopted here to prevent a failure of justice, there being no Court of Chancery to protect against such accidents.

OYSTER'S and EMIGH'S Road.

Party who removes a road from the sessions must procure the record to be returned, or a rule will be made that the sessions shall proceed therein.

A *CERTIORARI* had issued to the sessions of York county returnable to the last January term, to remove all proceedings before them respecting the vacating of a road in Manchester township. Mr. Bradford moved, at the last term, that the party who brought the *certiorari* should return the report by this term, or the sessions should proceed notwithstanding the *certiorari*. A rule was accordingly granted. And now, on his motion, the rule was made absolute, the record not being returned, though it did not appear that the party who took the *certiorari* was served with the rule.

The same rules also took place on a *certiorari* to York sessions to remove all proceedings respecting a road leading from Peach Bottom Road to the Landing Place on Susquehanna.

JOHN MORGAN'S Executors *vs.* CLEMENT BIDDLE.

GEORGE EDDY et al. *vs.* the same.

PETER WHITESIDE et al. *vs.* the same.

THOMAS BETAGH *vs.* the same.

Bill of sale, or mortgage, may be made of vessels at sea, provided they are reduced into possession by the vendee or mortgagee, as soon as they conveniently can, and the muniments respecting them are delivered up to the vendee or mortgagee.

THESE four causes were tried together by the same jury, by consent. They were severally brought to recover 2057*l.* 4*s.* 3*d.* in the defendant's hands as marshal of the admiralty, arising from the sales of the ship "Emperor of Germany," and brig "Catharine," libelled in that Court for seamen's wages.

The chief question that arose was, whether Morgan's executors had a lien on the ship and three-fourths of the brig, in consequence of an instrument of writing, in the nature of a bottom-ree bond, or mortgage, made by James Oellers, the owner, to Dr. John Morgan. The facts were these: On the 24th August, 1784, Oellers mortgaged the ship, then in Virginia, to Morgan, to secure him against certain bills of exchange drawn by him to the amount of 1800*l.* sterling, to be paid within fifteen days after the return of the ship and notice of the bills being protested. Morgan owned one-fourth of the brig, and she then being in the port of Philadelphia, was mortgaged by Oellers to him on the

31st August, 1784, to secure him against 2090*l.* sterling for other bills, on the same terms. Both vessels were bound to Ostend, in Flanders, and the bills were drawn to enable Oellers to lay in cargoes of tobacco for the voyages, &c. The brig reached Ostend safely. The ship put into the port of Philadelphia in 'distress on 19th September, 1784, and sailed again for Ostend on the 19th October. Oellers insured both vessels, and put the policies of insurance into Morgan's hands, which were assigned to him by the aforesaid instruments of writing. Oellers built both vessels, but had not received a *grand* bill of sale from the carpenters. At the time of the mortgage of the brig, he put a bill of sale of a Captain Glover to him, for one-half of her, into Morgan's hands also. The brig arrived from Ostend from Philadelphia, on the 13th April, 1785, and on the 28th May following was attached by process out of the admiralty for seamen's wages. On Sunday, the 29th May, the ship also arrived and brought intelligence of part of the bills being protested. On the 1st June she hauled into the wharf, and the same day she, together with the brig, was taken in execution at the suit of Thomas Betagh, on a judgment entered up against Oellers for 8000*l.*

After a very full argument, the Court unanimously gave it in charge to the jury, that the instruments of mortgage created a lien on the ship and three-fourths of the brig in favor of Morgan, provided the same were made *bona fide*. It is settled in the books, that a bill of sale may be made of a ship either at sea or in port, and the same will be valid in law, provided the vendee reduces her into possession as soon as he conveniently can. It is no where laid down, that on a sale of a vessel at sea, she must be reduced into possession immediately on her coming into port; though two of the cases cited state that it must be done before she proceeds on another voyage. Courts of justice take notice of this particular species of property, and it has been found convenient to the interests of trade and commerce that particular rules should be laid down for the governing of the transfers of ships. In the present instance there was no *grand* bill of sale, but at the time of the mortgage all the muniments were delivered to Morgan; Glover's bill of sale, the bills of lading, and policies of insurance. Morgan could not have taken possession earlier. After the voyages were determined on, the bills of lading signed, and the policies of insurance completed, had he taken possession, he would have broke up the voyage, discharged the underwriters, injured every person concerned, and defeated the very object for which the bills were drawn. He could not have discharged the captain. Besides, under the

express terms of the stipulation, he was not to receive possession until fifteen days after the return of the ship and brig, and notice of the bills being protested.

The jury, without leaving the bar, found a verdict for Morgan's executors for the full sum in the marshal's hands, and for the defendant in the other three suits.

The following cases were cited by Messrs. Rawle and Ingersol, of counsel with Morgan's executors:

Cooke's Bankrupt Law, 228, 231. 1 Burr. 474. 3 Co. 83. Moor. 638. 2 Term Rep. 462, 465, 376. 1 Atky. 154. 2 Vez. 272. Cowp. 432, 434. 2 Blackst. Com. 384, 398. 3 Term Rep. 618, 621, 117. 1 Equ. Cas. Abr. 358. 2 Equ. Cas. Abr. 482, 684. 1 Ld. Kaimes, 122.

By Messrs. Lewis and Sergeant, of counsel with Thomas Betagh: 2 Bac. Abr. 602, 604. Prec. in Cha. 285. Cooke's Bkt. Law, 65, 67, 228, 230, 231. Bull. Nisi Prins. 262. 2 Term Rep. 587, 594, 595. 1 Atky. 165, 173, 177, 178, 168. 1 Burr. 468, 474, 396. Lex Mercatoria, 118, 41. 6 Co. 72^b. 2 Blackst. Com. 458. 2 Bulst. 218. 1 Equ. Cas. Abr. 394, 321. 1 Wms. 394. 3 Wms. 280. 2 Burr. 940, 941, 942. Wesket, 59.

By Messrs. Wilcocks and Bradford, of counsel with Peter Whitesides and Robert Morris: 1 Vez. 345, 359. 1 Atky. 619. 2 Burr. 941. 2 Term Rep. 464. 1 Burr. 483. 2 Bac. 607. Cowp. 712. 13 Vin. 527. 1 Burr. 475. Cowp. 600. 1 Atky. 8, 162. 10 Mod. 35. Cro. Fac. 92. Sheph. Touchst. 84. Plowd. 160. Bulst. 252. 2 Brownl. 388.

JAMES RUMSEY vs. BENJAMIN WYNKOOP.

Seven suits, on protested bills of exchange, consolidated.

MR. HALLOWELL, *pro. def.*, moved to consolidate seven several suits brought on protested bills of exchange, drawn by the defendant, payable to different persons, which had been taken up for the honor of one of the indorsers; and cited Dallas 147, Comb. 244. The motion was not opposed by Mr. M'Kean, *pro quer.*, but he submitted the point wholly to the Court, and cited 2 Stra. 1149, 1178.

The Court, on considering the length of the declarations, ordered that the seven actions should be consolidated into three suits, and the plaintiff's attorney to proceed accordingly.

RESPUBLICA vs. JAMES ROBERTS.

Adultery, under the act of assembly of 1705, can only be committed by married persons. Under an indictment for adultery, defendant may be convicted of fornication.

THE defendant was tried at the last Nisi Prius Court for Bucks county, and a special verdict found by consent. It stated that he was an unmarried man, and that he had been guilty of criminal conversation with Isabella M'Glistler, her husband being then and now in full life. And whether the same were punishable as *adultery* in him, was the question. He had also been charged with bastardy, but as the attorney general had admitted at the trial, that her husband had not been far distant from her, and that she was not a competent witness to prove the want of access, he was acquitted of that charge by consent.

Mr. Bradford, attorney general, contended that the facts found involved him in the offense of *adultery*; that the act of assembly in 1705 did not describe what adultery was, and therefore the only point was, What was the received idea of the legislature when they passed the law? That the rule of construction as settled in 1 Blackst. Com. 59, was to find out the meaning either in the common and popular sense, or considered as a technical term according to the received sense of the learned in that science. To establish the common and popular sense of the word, he cited Johnstons's Dict. Voc. Adultery—2 chap. Leviticus, verse 10; 19 chap. Matthew, 9; 6 chap. Proverbs 29th and 32d verses; where the word is used as a general violation of the marriage bed, according to its derivation, "*ad ulterius thorum*" *ascendere*. To fix its technical sense, he cited 2 Inst. 486, 435. Cowel's Law Dict. Voc. Adultery. 4 Blackst. 64, 65, 191. 4 Burr. 2057. Pandects of the Civil Law, 82. Wood's Inst. of Civil Law, 300, 261. 2 Ld. Raym. 802. Laws of Connecticut, p. 8, and Espinasse, 430, that actions of criminal conversation are styled, in the modern books, actions of adultery.

Mr. Sergeant, for the defendant, contended that the crime was different in the civil and canon laws, and cited Encyclopædia Voc. Adultery, and that the act of assembly particularly describing that an unmarried woman having a child born of her body shall be deemed guilty of fornication, could not intend that the offense of an unmarried man should be greater than that of an unmarried woman. And that the true mode of fixing the meaning of the term was by the uniform general practise of courts of justice, who had proceeded only against married persons as having been guilty of adultery.

To this the attorney general replied, that no argument can be drawn from the practise, as it had received no judicial decision, and that public prosecutors might proceed against the party offending for the lesser offense, for a variety of reasons, as he himself had actually done this term; and further cited Pailey's Moral Philosophy, 201.

Per Curiam. The single question is, whether an unmarried man may be guilty of adultery, under the act of assembly. Originally, the offense was of temporal jurisdiction, but after the statute of *circumspecte agatis* it was remitted to the bishop of Norwich, and through him to the spiritual Courts.

Had the case been *res integra*, the decision of the Court might be different from what it now is. It is true that practise *sub silentio* will not make the law, but it is strong evidence of what the law is. It having been the constant practise to proceed against unmarried persons for fornication, though they may have been guilty of criminal conversation with married persons, we will not exaggerate the offense, nor carry it further than our predecessors have done; and therefore the Court pronounce him guilty of fornication, and fine him 10*l.* and the costs, and commit him to the sheriff of Philadelphia county, who always executes the process of the Court in bank.

Shippen J. The practise above mentioned is truly stated from my personal knowledge for forty-eight years past.

Another point occurred in the special verdict, which was not, however, contended by the defendant's counsel. It was whether on an indictment for adultery, defendant might be convicted of fornication. It was said by Mr. Bradford that the larger offense included the smaller, and that it might justly be resembled to an indictment for murder, where one might be convicted of manslaughter; or to robbery, where one might be convicted of felony, or to a felonious trespass, where one might be convicted of the trespass,—though the jury might acquit the party of the murder, robbery, or felonious trespass. And of that opinion was the whole Court.

JOSEPH LEE *vs.* JOHN BIDDIS.

Under the depreciation act, the original source of the demand must be recurred to. On a report under that act, evidence will not be received of the value of the property sold, by the court.

The auditors have full power to make allowance for vexatious conduct in the defendant.

THIS cause had come to trial in September term, 1786, when the plaintiff became nonsuit, part of his evidence having been over-ruled by the Court.

Thesuit was brought on a bond dated in September, 1779, constituted for the payment of 200*l.* good and lawful money of Pennsylvania, on the 1st August, 1782. The bond had been given in part of the consideration of a tract of land which had been contracted for in September, 1778, and 1000*l.* thereof was paid in continental money in the month of October, following. Referees had been nominated under the depreciation act, who had now reported for the plaintiff 302*l.* and costs.

A motion had been made for a rule to show cause why the report should not be set aside, and, upon the argument, it was contended that the referees had varied the original contract between the parties, and had not confined themselves to the scale appropriated by the legislature for settling such contracts during the period of the late war.

On the part of the plaintiff, a witness was offered to show what was the original agreement and intention of the parties from what passed at, immediately before, and after, the execution of the article of agreement and bond, and that the property sold was of much greater value than 1200*l.* reduced by the scale of September, 1778.

This was objected to by the defendant's counsel, who further insisted that the referees had exceeded the original contract of the parties by an allowance of six per cent for the rate of interest, whereas the condition of the bond limited the interest to three per cent; and the case of *Cooper vs. Coates*, in the Common Pleas of Philadelphia, was cited as ruled by Mr. Justice Shippen—that, on an obligation conditioned to pay four per cent interest, the interest shall be estimated at the same rate after the day of payment. They also cited the cases of *McElwaine vs. Mease*; *Wharton vs. Morris et al.* Dall. 125, and *Hollingsworth vs. Ogle.* Dall. 256.

Per Curiam. This is a case which evidently does not fall within the scale of depreciation. The original source of the demand must be recurred to; for injustice necessarily would be done by reducing the money by the rate of depreciation in September,

1779, when the bond was executed. The contract was made the year preceding.

We cannot, consistently with law, receive evidence of the value of the property sold, because that would tend substantially to vary the agreement of the parties, by making a new contract for them which they had not in contemplation at the time, and would be attended with the most dangerous consequences. But any circumstances which can be shown to us, indicating the real intention of the parties, and the nature of their agreement, we are bound to receive.

One Peter Thompson, who drew the bond, and the referees, were then examined as witnesses. The Court confirmed the report, declaring that the contract was clearly out of the scale. They observed that it had been suggested that more than three per cent interest had been allowed by the referees. But this did not appear. Nor could the Court know on what ground the allowance was made. It might have been on the ground of vexatious conduct on the part of the defendant, and the referees had full power to make the allowance, when settling the matters in dispute, upon the principles of equity and good conscience.

Mr. Lewis, *pro quer* ; Mr. Sergeant, *pro def*.

Executors of JOHN MORRIS vs. Executors of JAS. M'CONAUGHEY.

Bond accompanying a mortgage, and suit brought on it, Court will not prevent the plaintiffs from levying on what lands they please; but when the money is brought into Court, they will decide how it shall be disposed of, and who shall make contribution.

This case came before the Court on a statement of facts for their direction, on the application of the defendants. The facts stated were: That James M'Conaughey had, in his life-time, executed a bond to John Morris on the 17th January, 1777, conditioned for the payment of 400*l*. and interest, and also a mortgage of certain lands in Chester county; that the said bond and mortgage had been assigned on the 5th May, 1785, to Richard Hill Morris, by one of the executors of the said John, in payment of a legacy devised to him by said John, and by him assigned to Joseph Darlington, and Mary, his wife; that the said James had died, having made his last will and testament, dated 8th December, 1779, and therein had devised his real estate, consisting of eight tracts of land in Chester county, to his mother, Janet M'Conaughey; that the said Janet died in 1780, and by her will had devised the mortgaged premises to the said Mary Darlington for life, with power to dispose of the same at her decease; and that the executors of the said Janet,

in pursuance of the powers given to them by her will, had sold two of the said tracts for payment of his debts.

The defendants, in behalf of themselves and the other devisees of the said Janet M'Conaughy, moved the Court for their direction, that the sheriff of Chester county should levy on the mortgaged premises alone, the same being bound peculiarly for the payment of this debt.

It was contended that in this suit, the plaintiffs were not to be considered as creditors of the deceased James, inasmuch as they were fully paid and satisfied; that the mortgaged premises were about to be sold, and the said Joseph Darlington had paid the 400*l.* legacy devised to him (to secure the payment whereof this bond had been assigned to him), and procured the assignments to himself, and Mary, his wife, and the suit was now kept up for their benefit. Courts of law in this state exercise, in many instances, full chancery powers, though they differ in the mode of relief. They would effect in substance, what a Court of Equity would do, under all the circumstances of the case. James M'Conaughy had, in his life-time, mortgaged the land, which passed to the different devisees, *sub onere*. Brown's Cha. Rep. 58 454. Husband and wife cannot be joint tenants of a chattel interest in possession, yet they may be of a chose in action as of the bond and mortgage in question. If a statute be acknowledged, or obligation be made to baron and feme, it will survive on the death of the baron to the feme. 3 Bac. Abr. 191. 2 Vern. 683. 1 Rol. Abr. 342. On the settlement of the administration account of the executors of James M'Conaughy before the register of Chester county, on the 6th July, 1789, there appeared a balance of 1280*l.* 2*s.* 5*d.* due to the said executors; and that Mrs. Darlington, being a devisee under the will of Janet, could not be considered as a creditor under the will of James, her son. Neither of the wills had directed out of what funds the debts should be paid; and in the case of a mortgage given by one ancestor, the personal estate of the heir is not liable, nor the natural fund for paying it, unless the same is specially provided for.

The plaintiff's counsel, in their answer, divided the question before the Court into two points: 1st. Whether the creditors had not a right to levy on the whole of the lands for the payment of their debt; 2d. What fund is liable for this debt.

As to the first point it was said, that the plaintiffs had here a legal advantage, which no Court of law or equity would take from them. Where two have equal equity, and one has an ad-

vantage at law, no Court will ever interpose against him. Salk. 450. The money which went in discharge of Richard Hill Morris's legacy was Joseph Darlington's, not his wife's. The mortgaged premises were devised to her for life, with power of disposal by will after her death. Bond given to baron and feme, baron may sue alone without his wife. 4 Vin. Abr. 75. 2 Mod. 217. 3 Lev. 408. In chancery, where one fund pays moneys charged on another, relief will be granted. The plaintiffs, as creditors of James M'Conaughy, have nothing to do with the disputes between the devisees of Janet, his mother. Will the Court, in this instance, confine the remedy of the creditors, or narrow their security? The mortgage is but a collateral security; by taking it, the creditor does not relinquish his obligation. Both may be sued at the same time, though it is agreed there can be but one satisfaction. Equity will marshal assets between creditors only. The situation of the plaintiffs might be different possibly, if Joseph Darlington came to seek relief from the Court, upon his wife's lands being levied on. Cases of this kind here differ from those in England. There the lands of a deceased person are not liable for the payment of debts, unless by special provision. In Pennsylvania, every debt due from him is a lien on his real estate. In England, lands are only chargeable in the hands of the heir; when he sells them, they are discharged from the debt, though he may be insolvent. Janet took all her son James's lands under his will, but subjected to the payment of his debts.

Under the second point it was urged, that where one seized of three acres, acknowledges a recognizance and enfeoffs one acre to A., and one acre to B., and the other acre descends to his heir, who pays the recognizance, he shall not have contribution. 3 Co. 12 and 13. Where there are bond and simple contract creditors, and the first sweep away all the personal estate, equity will not interfere so as to narrow their security; but when satisfied, they shall assign their judgments to the other creditors. Gilb. Cas. in Chanc. 306. Mortgage may have satisfaction out of any fund, but this will not vary the right of the heir. 2 Atk. 436. At law a creditor may go on any fund. 2 Equ. Cas. Abr. 493, pl. 4. Lands bound to pay debts, heir shall be obliged to pay them. 2 Equ. Cas. Abr. 506, 604, pl. 35. Creditor at law may sue the heir, notwithstanding the personal estate is assets, and equity will not interfere with him. 2 Atk. 426. Where lands are generally charged with the payment of debts and legacies, there is no marshaling of assets, and simple contract debts come in equally with specialties. 2 Equ. Cas. Abr. 325, 375; 2 Wms. 386. 4 Vin. 467, pl. 2.

The executors of Janet M'Conaughey are residuary devisees under her will, and as the lands devised to Mrs. Darlington were not subjected thereby to the mortgage, it is presumable that the residuary legatees were intended to bear that burthen. The testatrix certainly intended something beneficial to her, as a near relation. Her intention must be collected from a variety of circumstances. In England, the equity of redemption is considered in chancery as assets for payment of debts. 2 Atky. 436. If this rule was to be extended to the present instance, Mrs. Darlington would get nothing. There is a difference between devisees to executors and strangers, where real estate is devised subject to the payment of debts, and where property is devised to executors, there such executors shall pay the debt. 4 Vin. 457, pl. 11, 459. 2 Vin. 143. Could not the plaintiffs have levied on the personal estate for their debt, and what relief would the executors have had in such a case? Other cases were also cited. 2 Equ. Cas. Abr. 370, pl. 10. 4 Vin. 456. Wms. 730.

Per Curiam. We see no reason for the Courts interfering in this business in its present stage, or preventing the plaintiffs from levying as they please; but when the money is brought into Court, we can decide how it shall be disposed of, if there is a dispute. We can then judge who shall make contribution, and to what amount, according to the value of their several devises.

Messrs. Bradford and Sergeant, *pro quer.*

Messrs. Lewis and Wilcocks, *pro def.* [See p. 189.]

ALEXANDER MITCHELL'S lessee vs. PETER DE ROCHE.

Agreement to sell lands; vendee pays part of the money and is put into possession; vendor may maintain ejectment if the full consideration money is not paid.

THIS ejectment was tried at the last assizes for Bucks county, when a verdict was given for the plaintiff by consent of counsel, subject to the Court's opinion in bank, on the following statement of facts proved and admitted.

The plaintiff's lessor being seized of the lands in question, agreed by a memorandum in writing, dated September 9, 1785, to sell to Claudius Paul Raguét (since become bankrupt) and Peter De Roche, the premises for 825*l.* specie, to be paid as follows; viz: 200*l.* in hand, and the remainder in six yearly payments of 125*l.* each, without interest. On the 13th September, 1785, Mitchell subscribed a receipt at the foot of the agreement

for 200*l.* in full of the first payment, and put the defendant into possession, which he has since held, but has made no further payments. The defendant is, and has been, for some time past, out of the state, but his wife and family live on the lands, and he is expected to return. Two judgments have been obtained against defendant while in possession, amounting to about 28*l.* with costs, which are still unsatisfied. The yearly value of the land since the time of the agreement, has been from 20*l.* to 25*l.*, and at the period of the contract the land was not worth more than 500*l.* Since the defendant came into possession some waste has been suffered and committed on the place, but he has made valuable repairs to the amount of 200*l.*

The question was, whether under these circumstances the action could be maintained.

For the plaintiff it was insisted that priority of possession was sufficient for the plaintiff, if no title was found for the defendant, and he claimed under plaintiff. 2 Saund. 112. Law of *Nisi Prius*, 103.

It has been more than once determined here (and particularly in a late case in Northumberland county, between the lessee of Smith and Slough *vs.* Buchanan) that ejectment will lie under a mortgage on non-payment of the money. The present case may be justly compared thereto. It is perfectly analagous. The vendor is at least equal to a mortgage in equity. When one party has trifled with his part of the agreement, equity will not decree a specific performance in his favor, especially if circumstances have altered. 5 Vin. 538, pl. 18. The word "*Pro*" makes a condition precedent. Law, of Evidence, 199, 201. 8 Mod. 42. The defendant's title was to vest on payment of the money stipulated, but not before.

Per Curiam. This is a very clear case. Without payment of the full consideration money, the defendant is not entitled to the premises on any principle of law or equity. Such is the evident intention of the contract. Let the defendant tender his money, and he can then recover back the land.

Judgment *pro quer.*

Mr. Sergeant, *pro quer.*; Mr. Du Ponceau, *pro def.*

JOHN ROSS'S and JOHN VAUGHAN'S lessees *vs.* EASON et al.

New trial granted in ejectment, where verdict was given for defendant against law and the directions of the Court.

MOTION for a new trial. This cause had been tried at the last November assizes in Northumberland county, and a verdict had passed for the defendants.

The chief justice now reported the evidence as it appeared on the trial, strongly in favor of the plaintiff, both at law and in equity.

On the part of the defendants it was contended, that though the legal title was vested in the plaintiff, yet the patent was issued by the governor of the late province, under a mistake and misapprehension; that the defendants claimed under a warrant issued in favor of the officers of the Pennsylvania battalion, of which Ensign Morrow was one, and that the vote of exclusion had against him by his brother officers was made on an improper and illegal foundation; that Morrow had paid his first quota of money of 16s., and that he was excluded from any benefit under the warrant, before any more money became due from him, in his absence, unheard and without notice. Where the weight of evidence is against the verdict, if there is a contrariety of testimony, the Court will not grant a new trial. 3 Wils. 45. It was also said, that though the general principles on which new trials are granted, would extend as well to cases where the verdict has been for the defendant as the plaintiff, yet no case can be shown in the books where the verdict has been for the defendant, that a new trial has been granted, and that the Court will not readily establish the precedent.

Quære, and *vide* Barnes, 440. Baker on the demise of Brown *vs.* Petcher. Contra.

Per Curiam. There can be no reason for ordering a new trial in ejectment in favor of the defendant, which does not hold in favor of the plaintiff; and in fact this Court has already ordered two new trials, where the verdict has been for the defendant against evidence and the Court's direction, one in the case of Robinson's lessee *vs.* Cherry, for lands in Bedford county; the other.*

*The name of this case cannot now be ascertained.—Ed.

It was shown on the trial that the plaintiffs had the clear legal title. The governor would not go on with the original grant upon Morrow being charged with the murder of certain friendly Indians on Middle creek, until he had acquitted himself of the charge. In consequence hereof, his name was struck out at a general meeting of his brother officers. Taking it in the strongest point of view, he had paid no more than 16s. If an injury was done him by the governor, his remedy was confined to him alone. Morrow never tendered his money, filed a *caveat* in the office, or took any decisive step in the business, until the whole matter was concluded. Jacob Kern obtained the patent; he sold to John Witmer, and he to the lessors of the plaintiff for large valuable considerations, without notice.

The case appears proper for re-examination.

The verdict was had against the Court's direction. The legal title is in the plaintiffs. There is great equity against the defendants, and little or none for them. Under these circumstances, on decided grounds of law and equity, we award a new trial, on payment of costs.

Mr. Smith, *pro quer.*; Mr. Bradford, *pro def.*

Lessee of GEORGE DOUGLASS *vs.* WM. SANDERSON.

S. C. 2 Dall. 116. A party allowed as a witness to prove the irregularity of a judgment, the service of a subpoena, or the inability of a witness to attend; so to prove that he has searched for the subscribing witness to a deed, or other collateral matter. Rules of evidence in the case of pedigree are much relaxed.

EJECTMENT of lands in Tyrone township, in the county of Cumberland. The cause was tried at Carlisle, the last November assizes, before Mr. Justice Bryan, when a verdict was given for the plaintiff for 280 acres, part of the land declared for. Two points had been reserved for the opinion of the Court in bank, which were now stated from Mr. Bryan's notes, he having died since the trial, and a new trial was prayed for on the part of the defendant.

The first point was, whether, on a deed being offered in evidence, and one of the subscribing witnesses proved to be dead, and his hand-writing proved, either of the parties could, by his own oath, legally ascertain that he had searched for the other subscribing witness with a subpoena, and he could not be found. It was contended, on the part of the defendant, that this proof ought to have been made by indifferent witnesses; that a party was never admitted to his oath except on a presumed necessity, which did not exist in the present instance, as the register of his

death might be produced; that to relax the rules of law respecting evidence, would be of dangerous consequence, and that it was settled in the books before a deed could be read, you must show that the witness thereto was dead, or strict proof be made (that is, by disinterested witnesses, as it was said) that you had searched for him and he could not be found, and cited 3 Comy. Dig. 282. 2 Atky. 48. 2 Stra. 920. 1 Atky. 444. Dall. 14. Gilb. For. Romanum, 140.

But to this it was answered and so ruled by the Court, that in many instances a party was allowed to be sworn, as to prove the irregularity of a judgment,—the putting off a cause by the service of a subpoena, and the absence or sickness of a material witness, or his inability to attend, &c.; that what the plaintiff swore here was matter of fact, and properly left to the jury as a collateral matter, and that the practise corresponded with the opinion of the judge. In *Levan's lessee vs. Hart*, tried here, Sebastian Levan, the plaintiff, was allowed to prove a search for a witness to entitle him to read certain articles of agreement, and in the case of *Means and Litle's lessee vs. Flora*, tried at Nisi Prius, at Lancaster, Mr. Litle, who was one of the lessors of the plaintiff, was permitted on argument to prove that a very material witness, whose deposition had been taken, was unable to attend the Court, by reason of his advanced age and indisposition of body, in order to entitle her to read his deposition. As to procuring a copy of the register, it is well known that such registers are frequently not kept; and besides, it is not always practicable to find out when the witness died.

Second point: The plaintiff deduced his title under the heirs and devisees of Charles M'Michael, who had purchased the lands from one Ludwick Laird, who had taken out the warrant. To prove that their grandsons were the children of Charles M'Michael, the leaf of a Bible, said to have belonged to the said Charles in his life-time, sworn to before the chief burgess and notary public of the borough of Wilmington, in Delaware, by some of the said heirs (as they would on no account part with the original book), and which was extracted from the said book in the presence of the said burgess and notary, and so certified by him in the affidavit under the notarial seal, on which were entered the several births and deaths of his children, was read in evidence to the jury.

It was contended, on the part of the defendant, that this affidavit and certificate ought not to have been received, and that it was preposterous for the parties who sold a disputed title, to bolster up their right by their own oath; and that all

these facts ought to have been proved under a commission to the state of Delaware, and cited Cowp. 591. Dall. 14.

It was answered, that the rules of evidence in cases of pedigree were very lax from the necessity of the case; that the deed itself was evidence of it, though the mere words of the parties; that there could be no use in examining on cross interrogatories, witnesses who were adduced to prove general reputation, and that it was ruled on full debate in the case of Fockler's lessee *vs.* Simpson, since the revolution, at Lancaster, in the Supreme Court, that an *ex parte* affidavit, made in England, was good evidence in case of pedigree.

Per Curiam. The judge admitted the evidence properly to go to the jury, under the special circumstances of the case, in proof of pedigree. Amongst a number of religious persuasions in this country, we well know no registers are kept. To prove births, deaths, or marriages, copies of registers have been frequently admitted; these are usually kept by the parish clerk. So of inscriptions on a tomb-stone to prove a death. In this case, the entries of the father, in the family Bible, are produced for the jury's inspection. It is probable that the children only could prove the property of the book. Besides, it does not appear to us that these heirs are interested in the event of the suit. No covenant of warranty appears to us in their conveyance to the plaintiff.

Postea delivered to plaintiff.

Mr. Lewis, *pro. quer.*; Mr. Bradford, *pro def.*

AT NISI PRIUS, AT WESTCHESTER,
MAY ASSIZES, 1791.

CORAM, SHIPPEN, AND YEATES, JUSTICES.

Lessee of ISAAC KNIGHT, and MARY, his wife, *vs.* NICH. PECHEN.

Where attachment can issue to compel the attendance of a witness at Nisi Prius, the judge will award it; otherwise the application must be made in bank.

MR. LEWIS, for the defendant, moved the Court for an attachment against Joshua Williams for contempt, in not attending as a witness after being duly subpoenaed by the defendant. The action had been put off by the Court, on argument, for the term, previous to the motion, under the special circumstances of the case.

Per Curiam. Where a witness can be brought forward by attachment, after disobeying the process of subpoena, so as to compel his attendance, to give testimony during the period of the Nisi Prius Court, the attachment may be issued at Nisi Prius, to obtain an early decision of the suit; but when the action has been already postponed for the term, the application for the attachment must be made in bank; and such has been the uniform practise.

The motion was denied.

Mr. Wilcocks and Mr. Tilghman, *pro quer.*

ABRAHAM CORNOGG *vs.* ISAAC ABRAHAM and JANE, his wife,
DANIEL CORNOGG, and GEORGE GEORGE, Executors of DANIEL
CORNOGG.

A trial will not be ordered on where a party has not prepared, expecting a compromise from the declarations of his adversary; and the costs in such case ordered to continue on the remanet.

THIS cause came before the Court under a rule on the plaintiff to bring on his cause to trial at this time, or that a nonsuit should be entered. A motion was made to put off the action on the plaintiff's affidavit, that in a conversation which took place between him and his brother, the acting executor, about four weeks before, he was induced to believe that an amicable settlement would be effected by the intervention of mutual friends; and that his brother proposed to call on him for that purpose, that they might go together to Philadelphia, and that in consequence of this expectation, he had made no preparations for trial. The defendants called two witnesses, who

were present during the whole of the conversation referred to, who gave a different account of that conversation, and declared that they did not hear the particular declarations sworn to by the plaintiff.

The Court, on consideration, postponed the cause, the plaintiff having sworn positively to his account of the transaction, and though he might have misconceived the expressions of his brother, his ideas of the whole had prevented him from coming prepared for trial.

The defendants then moved for a rule that the plaintiff should pay the costs of the term, but this was denied by the Court, who directed that the same should, under the peculiar circumstances of the case, continue on the *remanet*.

Messrs. Lewis and Sergeant, *pro. quer.*

Messrs. Wilcocks and Thomas Ross, *pro. def.*

AT NISI PRIUS, AT LANCASTER,

MAY ASSIZES, 1791.

CORAM, SHIPPEN, AND YEATES, JUSTICES.

JACOB YONER *vs.* JOHN NEIDIG.

In trover, plaintiff must prove property in the thing in controversy.

TROVER for a parchment deed, executed by the plaintiff to the defendant, and one Michael Quickel.

The plaintiff had conveyed to Neidig and Quickel an old right to locate 400 acres of land, on the 22d May, 1761, and they had passed their bond to him for 330*l*. A suit had afterwards been brought on this obligation, and referees had been appointed by consent at Nisi Prius, who reported in favor of Neidig, April term, 1770.

The counsel for the plaintiff contended, that as the referees had been of opinion that no lands could be secured under the old right, the same should have been delivered up to Yoner on demand, and that the defendant held the same as his trustee; and that though he had succeeded against him in the action of debt, yet the present suit will lie, and cited 1 Burr. 301. 4 Burr. 2336. 3 Mod. 1, 2. 1 Mod. 207. Cro. Car. 35. Cro. El. 667.

But the Court was clearly of opinion that in trover the plaintiff must prove property in himself, in the subject of controversy. In this case, Yoner having executed a conveyance to Neidig and Quickel, the deed belonged to them, and he could have no recourse to them for the deed, which was their property by the plaintiff's act, and therefore directed a nonsuit, which was had accordingly, and the jury discharged from giving a verdict. Vid. Bull. 33 to 36.

Messrs. Bradford, Hartley, and Bowie, *pro quer.*

Messrs. C. Smith and Clark, *pro def.*

Lessee of ROBERT CAMPBELL *vs.* JOHN SPROAT.

A discovery of a material witness in another state will, under special circumstances, be a ground to put off the trial. The Court in ejectment are bound to take notice of the real parties litigating, that a fair trial may be had.

THE defendant's counsel moved that the cause should be put off on the affidavit of Alexander Snodgrass, that within the period of two or three weeks before the trial, he had discovered one Thomas M'Dowell, a witness, who lived in Maryland, who was very material for his defense; that he had conversed with him, and had procured his promise to attend; and that he had subpoenaed him, but upon going for him during the sitting of the Court, found that his child's illness prevented his attendance, and expected that he would be able to procure him to attend at another Court. Snodgrass's coming to the knowledge of the witness since the last sitting of the Court in bank, had put it out of his power to procure a commission to take his testimony out of the state.

The plaintiff's counsel objected that Snodgrass was a stranger to the record, and it was his own negligence, if he was the real landlord, that he was not named a defendant upon appearance to the ejectment; that the plaintiff claimed under the deed of the defendant himself, and the witness necessary for the defense should have been earlier sought for, and that one merely claiming the land without having the possession (2 Crompt. Pract. 178, 179, 180), could not be let in to defend the title, as in the case of a title by escheat. 3 Burr. 1291.

The Court desired to be satisfied who were the real contending parties, declaring, as in 3 Burr. 1294, per Lord Mansfield:

“An ejectment is an ingenious fiction for the trial of titles to the possession of land. In form, it is a trick between two, to dispossess a third by a sham suit and judgment. The artifice would be criminal, unless the Court converted it into a fair trial with the proper party.

It was then proved to the Court, on oath, that in consequence of a conviction of Campbell of a forcible entry and detainer of the premises in question, before two justices of the peace at the suit of Snodgrass (which had afterwards been reversed for informality, on a *certiorari* brought in the Supreme Court), Campbell had delivered up possession thereof to Snodgrass, who held by deed also from the defendant, he (Sproat) being entitled to certain privileges on the land that were reserved at the time of sale.

Per Curiam. We are bound to take notice who are the real parties litigating. We are not constrained by the formal parts of the proceeding. Courts sit to do substantial justice, and though we are fully disposed to bring on causes as early as it may be done, yet this must necessarily be in those cases where the parties are prepared, or have been guilty of manifest negligence. No delay appears to be affected on the part of the defendant under the particular circumstances of this case, and Snodgrass's having come to the knowledge of this witness so lately, the cause must go off on his paying the costs of the term.

It was then urged that Snodgrass should be substituted a co-defendant, but the plaintiff's counsel objected thereto, saying he had slipped his time, and insisted that the point should be argued. They came, however, into the measure by consent during the Court, and he was substituted accordingly.

Messrs. Bradford, Kittera, and Montgomery, *pro quer.*

Messrs. Hartley, Smith, and Hopkins, *pro def.*

Lessee of HENRY BOWMAN vs. MARTIN FRY.

Vendees under sheriffs, or auditors under the attachment law, shall not be put to the same proof in ejectment as in common cases where the debtor has been in possession; the *onus probandi* shall lie in the adverse party.

THE lessor of the plaintiff, by several mesne conveyances, showed a title in himself to twelve acres of land, being the premises in question, in Earl township.

The defendant proved by William Smith, that during his sub-lieutenancy in the militia, he called on Henry Bowman for his substitute fine, and was told by him that he had sold a piece of land (meaning the land in controversy) to his brother, Martin Bowman, and he would pay the fine for him, which was done accordingly; that the said Martin cultivated the lands for some time, and afterwards absconded; that the twelve acres were attached with other lands, by the sheriff, upon process out of the Court of Common Pleas, and publicly sold at vendue as the said Martin's, no person appearing to claim the same, or making any objection thereto. The deed from the auditor to the defendant for 356 $\frac{1}{2}$ acres (including the lands in question) dated 3d June, 1786, in consideration of 600*l.* was also shown to the Court and jury.

Shippen J., in giving his charge, said, the case of a purchaser under a sheriff or auditors, by virtue of an attachment, is materially different from the common cases of persons buying lands from individuals, nor does the law expect the same regular titles to be shown in the former as in the latter instances. It is evident that the debtor keeps his deeds in his own possession, and seldom can they be obtained from him. The policy of the law therefore declares, and it is consistent with the plainest common sense, that wherever the debtor appears to have been in possession of lands, which are afterwards sold by due course of law, that the burthen of proof shall lie on the person who sues to recover the same; and he shall be put to account how such debtor came into possession, and under what title, or pretext thereof, or claim, he obtained such possession, and also show a notoriety of claim on his part, previous to the sheriff's sale. Unless this can be done to the satisfaction of the jury, a verdict should be given against such plaintiff.

Which was accordingly given in the present suit.

Mr. G. Smith, *pro quer.*; Mr. Kittera, *pro def.*

JOHN MILLER, Esq., late Sheriff, *vs.* JOHN HAYMAN.

A party interested will be admitted as a witness for the sake of trade and the common usage of business. So an agent, factor, or attorney, bidding for another, may prove his own power.

ASSUMPSIT. The plaintiff, as late sheriff of Lancaster county, declared on two counts against the defendant for 436*l.* on a sale of a house and four lots of ground in the borough of Lancaster, late the property of Jacob Reigart. The first was a special assumpsit, stating the plaintiff's being sheriff, the different executions issued, the property levied on, advertised, and sold to defendant, the same being struck off to Joseph Hubley, Esq., his attorney, specially authorized for that purpose. The second was a count on mutual promises, that upon a communication had between them, the defendant had agreed to purchase for 436*l.*, that the plaintiff had tendered him a deed, but that the defendant did not comply with his promise, &c.

Joseph Hubley, Esq., was offered as a witness on the part of the plaintiff, and was excepted to on the score of interest. It was said he might lose by the event of the suit, because, if the plaintiff did not recover in the present action, he might recur to the witness on his bid. It was also said that his authority to purchase as an agent must be proved by other testimony, and that this point had been determined at Nisi Prius at Lancaster, May assizes, 1788, in the case of Samuel Cunningham *vs.* William Galt et al., where it was held that John Whitehill should not be received to testify that he was appointed the agent of the plaintiff, to receive certain monies due to him from the Presbyterian congregation of Pequea; that the cases of factors put in the books were chiefly sales by factors, which are readily distinguished from the present suit; and that no man could be safe if this practise was gone into. A servant of the most prudent master may at any time charge his master to any amount by his own oath. He may take up goods to any value, swear that his master gave him the orders to purchase, and if other proof was not necessary to prove his authority, no precautions whatever could guard against the mischiefs which must necessarily be hereby introduced.

On the other hand, it was contended that Mr. Hubley was a competent witness.

The plaintiff's counsel cited 1 Atk. 248: "If a factor sells goods for a principal, he may bring an action in his own name; or, an action may be brought in the name of the principal against vendee, and a factor may make himself a witness. So a vendor of goods to a factor for the use of his principal, may maintain an action against the principal for goods sold, and the

factor may be made a witness for the vendor. It has been often so settled at Guildhall."

3 *Wils.* 40. A factor who sells for plaintiff, and is to have 1s. in the pound, is a good witness to prove the contract and sale. "He is a mere go-between as to the vendor and vendee, and may be a good witness for either of them."

As to the case of *Cunningham vs. Galt et al.*, it was answered that the exceptions against Mr. Whitehill were, that he was a member of the congregation, and bound to contribute his proportion under the general engagement of the society, and cases to this purpose, viz: 2 *Blacks. Rep.* 695, 949, and 5 *Burr.* 2611, were cited upon that argument. And also it appeared by the deposition of the Rev. Robert Smith, read by the plaintiff on that trial (which was now produced in Court) that Mr. Whitehill was more immediately interested, the money for the work done by Cunningham having been collected from the members of the church, and paid to him in January, 1778, and that the same lay in his hands until the year 1780.

Per Curiam. A party interested will, in some instances, be admitted a witness for the sake of trade and the common usage of business; or, where no other witness is reasonably to be expected. *Bull.* 284. Nothing is more frequent in the city of Philadelphia, than persons buying lands, ships, and other property to a great value, through the medium of their friends. They, in many instances, do not wish to appear openly as bidders, at public out-cry. It would materially affect all such transactions, if the power or authority to purchase could not be proved by the agent or factor bidding. But the rule now laid down is not intended as a general one.

Mr. Hubley was sworn: But the Court reserved the point, in case the defendant's counsel should wish to have the matter considered in bank.

Verdict for the plaintiff for 505*l.* 6*s.* 7*d.*, including interest from the day of execution of the sheriff's deed.

Messrs. Hartley, Bowie, and C. Smith, *pro quer.*

Messrs. Bradford, Kittera, and Barton, *pro def.*

The point reserved was not afterwards moved in bank.

AT NISI PRIUS, AT YORK, MAY ASSIZES, 1791.

CORAM, SHIPPEN, AND YEATES, JUSTICES.

JAMES HANNUM *vs.* WILLIAM ASKEW.

Privilege of a suitor does not hold in the case of judicial process.

MOTION to discharge the defendant from his arrest, he being taken under a *ca. sa.* while attending this Court as a suitor. It was said by his counsel, that the authorities cited in Wood's Institute, 503, 576, 596, 600 (according to the different editions), do not prove the doctrine there laid down. And the Court in Starrett's case, Dallas 356, 357, relied much on Wood. Neither 1 Vin. 11, 1 Lev. 159, or 3 Inst. 141, upon inspection, establish any distinction as to privilege in the case of mesne and judicial process. The word "arrest" is comprehensive, and will equally include both. They urged the inconveniences which must necessarily attend the practise of not extending the privilege of the Court to arrests on a *ca. sa.* No juror or witness would obey the legal process, if, when called to discharge their duties, they would be liable to be imprisoned by an execution. It was contended, also, that there was a difference between the taking on a *ca. sa.* which had issued before the privilege commenced, in which case the Court would not relieve, and where the execution had issued after the commencement of privilege. In the last instance, it was said to be an immediate contempt of the Court, wherein its honor was deeply interested to afford redress.

Shippen J. The doctrine is well and summarily laid down in 3 Blackst. Com. 289, respecting privilege. I think him much better authority than Wood, as a common law writer. He says: "Clerks, attorneys, and all other persons attending the Courts of justice, are not liable to be arrested by the ordinary process of the Court, but must be *sued by bill*, as being personally present in Court." These words explain his idea of "arrest," and confine it simply to mesne process. The difference contended for as to the time of issuing the execution, cannot exist; for the sole question is, whether the service of the *ca. sa.* under such circumstances, is proper or not. No case has been shown where privilege has been held to extend to a *ca. sa.*, and whatever may be the inconveniences resulting from a contrary doctrine, I conceive myself bound "*stare decisis*."

Yeates, accord. I was of counsel in Starret's case, and it was then pressed that the authorities cited by Wood did not warrant his doctrine. This gave rise to the chief justice's remark respecting the author. Upon my return from the circuit, I examined the point very fully, and found that 2 Trials per Pais, 382, 3 Salk. 46, Crompton's Just. 162 *a*, or 181 *b*, according to the different editions, fully established the distinction which is now contended against. Upon the most thorough search, I could not find any cases of discharges upon *ca. sa.* on the foot of privilege, except where attorneys were taken on executions immediately attending in court or on a judge. It, perhaps, is probable, the mode and time of taking were in those instances deemed contempts, and held to be an immediate impeding of justice, such as an attorney attending his client's business in the hall, was arrested on an attachment for contempt, but discharged. Pract. Reg. in C. B., 40. So where taken in execution on a *ca. sa.* Cooke's cases of Pract., 64. So attorney taken in execution while attending the execution of a writ of inquiry, discharged. Pract. Reg. in C. B., 41; Cooke's Cas., 102; 1 Barnes, 137, S. C. So attorney summoned to attend a judge, and taken in execution during his attendance, discharged. Cooke's Cas., 140. Motion denied. Vid. 1 Hatsel's Precedents, 47, 66, 67.

Messrs. Duncan and Hopkins *pro quer.*

Messrs. Randolph and Hamilton *pro def.*

This point was decided differently in the Circuit Court of the United States for the district of Pennsylvania, between Broome and Hurst, October Sessions, 1804.

JACOB MILLER vs. FREDERICK LITTLE.

One of the vendors of cattle, who is equally liable to both parties in replevin, allowed to give evidence.

REPLEVIN for twenty-seven head of horned cattle. Defendant's plea, property in himself. Plaintiff replies, property in himself, *absque hoc*, &c.

The question in this case turned on a mere matter of fact, whether John and Jacob Werner, to whom the cattle formerly belonged, sold the same to the plaintiff upon credit or not, having received 20s. by way of earnest to bind the bargain. It was

admitted on the part of the defendant, that some conversation had taken place between them respecting a sale; but he said that the Werners would not sell unless they were paid the ready money, and that finding themselves disappointed by Miller, they afterwards sold the cattle to the defendant for 109*l.* 7*s.* 6*d.*, and delivered the same to him.

The deposition of Jacob Werner, one of the vendors, taken in pursuance of a rule of the Court of Common Pleas, was offered in evidence on the part of the defendant, to show that a treaty had begun between himself and Miller about the cattle, and that he agreed to sell him the same, provided he paid the cash in a few days before delivery, but that Miller failing therein, he had sold and delivered them to Little, and received the full consideration.

This testimony was excepted to by the plaintiff, who contended that he was interested in the event of the cause; that the sale of a chattel is an implied warranty of the property on the part of the vendor (3 Blackst. Com., 164); that no case could be produced where, on a question respecting the title to personal property, the vendor had been admitted as a witness; that it was analagous to the case of land, where a vendor had been admitted a witness as to title, there being no covenant of warranty (1 Stra. 445), which necessarily implies where there has been a warranty he could not be a witness (*vide* 1 Vent. 15); and that he was more deeply interested in establishing the validity of the sale to Little, inasmuch as he had received the full amount of the cattle from him, which consequently must be recovered of him in case of defendant's failure in the present suit; whereas he had received only 20*s.* from the plaintiff by way of earnest.

To this it was answered, that Jacob Werner swears against his interest, as he subjects himself thereby to the suit of Miller, in case he had sold to him; and though a legatee is no good witness to prove a will, yet he may be admitted to swear against it (2 Salk. 691); that he was equally liable to both defendant and plaintiff, and the degrees of interest could not be measured, and that, therefore, the scales of interest being even on both sides, he might well be admitted. *Vide Colles's Cases in Parliament*, 91 S. P.; 1 Burr. 422.

The Court directed the deposition to be read, conceiving the objection of a supposed superior interest on the part of the witness to go to his credit with the jury, but not to affect his competence, he being equally liable to both parties. 4 Burr. 2254.

But the point was reserved at the instance of the plaintiff's counsel, to be considered in bank, in case they should think proper to move it. It was not moved again.

Messrs. Bradford, Hartley, and Bowie, *pro quer.*

Messrs. Kittera, Riddle, and C. Smith, *pro def.*

Verdict for defendant, and the value of the cattle assessed to 109*l.* 7*s.* 6*d.*

Lessee of THOMAS LILLY *vs.* GEORGE KITZMILLER.

Courses and distances run on the ground are the true survey; the return of the surveyor is only evidence thereof. His frauds or mistakes may be examined by parol proof. In Maryland the courses and distances *returned* to the proprietary office form the survey. A release to a person, otherwise interested, will make him a competent witness. Ex parte affidavits to establish independent facts, cannot be received in evidence. Agreement between the proprietaries of Pennsylvania and Maryland, of 4th July, 1760, cannot affect the rights of persons claiming under either proprietary previous thereto.

EJECTMENT for one messuage, grist mill, saw mill, &c., and 156 acres of land, in Manheim township.

The lessor of the plaintiff grounded his title on a Maryland patent for 6,822 acres of land, dated 11th October, 1735, founded on an original warrant for 10,000 acres, dated 1st April, 1732, which, according to the custom of the land office of Maryland, had been renewed nine times; also on a Maryland warrant of re-survey, to re-survey the ancient metes and bounds, correct errors in the first survey, and add contiguous vacancies, whether cultivated or not, dated 15th July, 1745; a survey thereon of 3,679 acres, made October, 1745, and patent dated 18th October, 1745.

He also relied on the two agreements of the proprietaries of Maryland and Pennsylvania, the first dated 10th May, 1732, under the 11th article whereof, "persons holding lands under either of the proprietaries, though beyond the division line of the two provinces, were secured and quieted in their rights and possessions," and the order of the king in council, made in pursuance thereof, on the 25th May, 1738; and the second agreement, made on the 4th July, 1760, under the proviso whereof it was declared, that "nothing therein contained should be construed to extend to the respective grantees, or those claiming under them." He deduced his title under a will, divers mesne conveyances and descents, to the lands contained in both patents, remaining unsold by John Digges, the original patentee, and Edward Digges, his eldest son, who, by the jurisdiction of Maryland being exercised over those lands in consequence of the mutual agreement of the proprietaries, and the royal order, until the final division line should be run, took the whole real estate as heir-at-law to his father..

The defendant's title rested on a warrant to Martin Kitzmiller for 150 acres of land, including his improvements, issued from the land office of Pennsylvania, dated 5th February, 1747;

a survey thereon of 164 acres, made 30th May, 1759; a patent dated 17th September, 1759, and a conveyance from the said Martin Kitzmiller and Juliana, his wife, to the defendant, in consideration of 800*l*. It was proved that the defendant and his ancestor had been in possession of the lands in question since the years 1738 or 1739.

It was admitted on both sides that the temporary line between the two provinces was run in 1739; the final division line, run by Mason and Dixon, was completed in 1767, and that the proclamations of the respective governors issued in 1774.

The instructions of Lord Baltimore to Charles Carrol, Esq., his agent, dated 12th September, 1712, were also shown by the defendant's counsel, whereby the mode of assigning warrants was pointed out, and wherein he directs that in each survey the boundary tree alone should be marked, and the courses and distances specified in the return of survey as the *fairest mode*, and best calculated to *prevent civil suits!*

Hannah Owings was offered as a witness on the part of the plaintiff, to show that one Edward Stevenson, the deputy surveyor, did not return the first survey as actually made by him on the ground, either by fraud or mistake; that the quantity of 10,000 acres was really contained within the lines of the lands run by him, including the lands in question, and that upon making his plat and finding the figure to be very irregular, he got displeased, and swore he would not cast up the contents or return it in that form, and then reduced a number of lines into one, struck off five or six angles in different places, and made a new plat, different from the courses and distances run on the land, and of 270 courses contained in the field notes, which were several years in his possession, he left out above 150 of them, and that the witness afterwards delivered those notes to John Digges, the patentee.

The defendant's counsel excepted to this testimony on three grounds: because, 1st, the witness was not present at the survey; 2d, she contradicts the return of the survey, which practice would necessarily engender disputes and perjuries, and place the security of landed titles on the frail memory of witnesses; 3d, Stevenson, the deputy surveyor, was agent both for Lord Baltimore and his patentee.

But the Court overruled these objections without difficulty. They asked, how could frauds or mistakes be otherwise detected unless by parol testimony, in most instances? A proprietary surveyor was not an agent (properly so called) for the people

whose lands he surveyed. He was appointed by the proprietor, and removable by him alone. Such a surveyor, by his return, could not bar the title of a person which was vested in him by an actual survey. The courses and distances run on the ground are the true survey, but the return of the surveyor is only evidence of it, and not conclusive.

The witness was accordingly sworn.

[NOTE.—The instructions from Lord Baltimore, in 1712, to his agent, Mr. Carrol, were not given in evidence until the defendant's title was afterwards shown.]

The deposition of John Shreyer, taken in pursuance of a rule of Court, was offered in evidence on the part of the defendant, but objected to, because he was said to be interested. The proof to show this was by Conrad Dotterer, who *voluntarily* swore (he could not have been compelled) that Shreyer had sold him 100 acres of the lands contained in the original patent to John Digges, and a tract of land under a Pennsylvania right, which would fall within the re-survey. Hereupon a release from Dotterer to Shreyer, executed before the taking of the deposition, was shown, releasing to him all demands under the covenants in the deed.

Mr. Lewis, *pro quer.*, cited Gilb. Law Evid., 130, "A witness who has part of the land sells, though *bona fide*, and for good consideration, if it be after he is summoned to be a witness, or after he has had notice of the trial, the Court will not admit his evidence;" and contended that the same mischief which the above principles guarded against existed in the present instance. But the Court disallowed the objection, and said, it was every day's experience to admit persons to give evidence under such releases, purging any interest that they might eventually have in the matters in controversy, though made at the bar during the trial; and the deposition was read accordingly.

An *ex parte* affidavit of John Leman, sen. (who was proved by Hannah Owings to have first settled on the lands in controversy under John Digges, but who declared to the said Digges, in 1752, according to the testimony of his son, John Leman, jun., in open court, that he had settled on the same under a Pennsylvania right), taken before Nathaniel Wickham, a justice of the peace of Frederick county, in Maryland, on the 21st February, 1754, authenticated by a certificate under the seal of the said county that he was a justice, and that the subscription was his hand-writing, and the hand-writing of the said justice having

been also proved by a witness in open Court, was offered in evidence on the part of the plaintiff, to prove that the said John Lemon, sen., had, in the years of 1735 or 1736, agreed with John Digges for 100 acres of the lands now occupied by the defendant, and had received orders from Digges to his agent, Robert Owings, to survey the same for him; that he continued there some time, and had a son born on the land, and afterwards sold his improvements to Martin Kitzmiller, who in 1737 or 1738 came to live on the land. The same was objected to by the defendant's counsel for five reasons: Because, 1st. It was not ascertained that the same John Leman, who made the affidavit, was the same person who made the first settlement. 2d. If the witness swore what was false, he could not be convicted of perjury, the oath being voluntary. 3d. The affidavit was taken *ex parte*, and it is against natural justice that a man should be concluded in a cause to which he was no party, and where he had no liberty to cross-examine the witnesses. Gilb. Law of Evid. 60. 4th. The affidavit does not go to ascertain boundary, concerning which the rules of evidence are very lax, from the necessity of the case, but is brought forward to establish independent facts, and vest a title to the whole of the lands in controversy. And 5th. Because of the inconveniences which must necessarily result from the introduction of such testimony.

The plaintiff's counsel answered that better evidence would not be expected than was in the power of the party to procure. It rested on the foot of necessity, as the facts attempted to be proved happened above fifty years ago, and no one could keep his witnesses alive. The affidavit of Leman was also considered as a letter, written by him, with the attestation of the justice as a witness. It is proved that he came in under the title of Digges, though denied by his son, who shows other declarations on his part; and as the defendant does not produce the conveyance or transfer which his ancestor obtained from Leman, this paper, in nature of a letter, explains the transaction, and are his written declarations some years after the time, showing the rights under which he held possession and what rights he sold.

But the Court overruled the affidavit, being taken *ex parte*, and evidently brought forward, not to ascertain boundary, but to establish independent facts, which would, in the event, be productive of the most dangerous consequences.

Two other *ex parte* affidavits of Robert Owings, taken 18th July, 1746, before a justice of Baltimore county, authenticated as

above, and proved by a witness to be the hand-writing of the justice, were offered in evidence on the part of the plaintiff, to prove that in 1732 or 1733, John Digges directed him to lay out and dispose of sundry parcels of land, which he accordingly did, and that the lines run did not extend beyond the limits of the first survey; that the lands laid out for John Leman and others were actually in the original survey, except a few corners, and that the witness believed that Edward Stevenson, the deputy surveyor, actually omitted part of the lines by him really run.

And also one other *ex parte* affidavit of Thomas Prather, who made the re-survey (authenticated as above) without a date, was offered in evidence on the part of the plaintiff to prove that in 1747 he executed the warrant of re-survey; that John Digges ordered Robert Owings to attend him during that service, and Digges and Owings both told him that Stevenson, the deputy surveyor, was to receive his directions from Owings in making the original survey, and the witness also was, by Digges's order, to receive his directions in making the re-survey; that his orders from Digges were to run the old lines as nearly as possible, and rather to leave out land than take in different lands; and that Owings told witness that Digges intended originally to survey the whole 10,000 acres of land there, and which were actually included in the lines really run by Stevenson.

But the defendant's counsel objected to the reading of the said last three depositions, for the four last reasons mentioned as their grounds of exception to John Leman's testimony.

And the Court, on argument, overruled the same, *causis quibus supra*.

The Court, however, at the instance of the counsel, reserved the points of testimony hereinbefore resolved, to be considered and determined in bank, in case the counsel on either side should think proper to move them. (But they were not stirred again.)

The Court, in their charge to the jury, after summing up the title of the plaintiff and defendant to the lands in question, said in substance as follows: The lands in dispute lie four miles north of the boundary line between the states of Pennsylvania and Maryland. Independent of the proprietaries' agreements, Lord Baltimore could have no right to grant lands beyond the limits of his province. Whatever, however, was granted by either proprietor, though beyond their respective limits, before the royal order of 1738, was secured to the settlers by their mutual agreement. But the subsequent agreement of 1760 could not affect the rights of persons claiming under either proprietor

previous thereto. The great question in this cause is, whether the first survey included the lands now possessed by George Kitzmiller, the defendant.

It appears to us there is a failure in the plaintiff's title in this early stage of it. Under the practise in Pennsylvania of making proprietary surveys, trees are marked on the ground, and where there are no trees or natural boundaries, artificial marks are set up to distinguish the survey. By these means, if the surveyor return a draft different from the courses and distances actually run, the mistake is easily corrected. Should the surveyor commit an error in his return, it shall not affect the rights of the party. Such cases have frequently happened.

But the case is very different under the ancient practise of making surveys under the proprietaries of Maryland. Such surveys were merely ideal, and precisely fixed on paper alone. No trees were marked except the beginning boundary. Lord Baltimore's instructions of 1712, to his agent, Mr. Carrol, which have been read, clearly show us what his intentions were, and that he was concluded only by the courses and distances returned. The survey was ambulatory — not confined to a certain spot of land, but was governed by the variation of the compass, and was continually shifting. The *courses and distances returned* formed the *survey*, and determined on an exact admeasurement the particular lands granted as often as they were run. Those courses and distances alone were binding on the proprietor, and consequently on his patentee. It necessarily follows, under our idea, that as the testimony of Hannah Owings, or any other circumstances shown in this cause, cannot establish a title to lands without the limits of the original survey *as returned*, that the plaintiff must fail in the present suit.

We mean, however, in thus giving our opinion, which we have taken some pains to form, to confine ourselves to the express case before us. It is not intended to affect other rights. Persons who have bought lands from Messrs. Digges, even within the re-survey, may have acquired titles by their possessions and improvements, which should not now be shaken.

The jury retired from the bar early on Sunday morning, and soon agreed on their verdict, but the plaintiff took a nonsuit.

Messrs. Randolph, Lewis, Hartley, and Smith, *pro quer.*

Messrs. Bradford, J. Smith, and Bowie, *pro def.*

JULY TERM, 1791.

PRESENT—M'KEAN, CHIEF JUSTICE. ATLEE, SHIPPEN, AND YEATES, JUSTICES.

DAVID SNEIDER *vs.* WILLIAM GEISS.

Quare. If in a suit against an inn-keeper for money lost in his house, the plaintiff may not, by his own oath, prove the contents of a bag delivered to be kept for him? An inn-keeper is liable for whatever is deposited in his house; but if the trust is reposed in another person, then the case is taken out of the general rule.

Suit against the defendant as an inn-keeper for 230 Spanish milled dollars, on the custom of the country. The *narr* also contained a count in trover for the money.

It appeared, in evidence, that the plaintiff usually lodged at defendant's inn in Philadelphia, and had several times before delivered parcels of money to Elizabeth Geltner, his step-daughter, to be taken care of for him. She was in the house as a relation, and occasionally assisted in the business of the family, though she was not in the bar or in the capacity of a servant.

The money declared for was delivered in a bag to her by the plaintiff, and carried up stairs into the defendant's bed-chamber, when he was present at a desk examining some papers. She said, on putting the bag down, "this is Snider's money," but he neither spoke, turned round, nor looked at her. It appeared, however, that he afterwards noticed the bag. Defendant afterwards left his house, and after his going, the said Elizabeth saw the bag lying on the table in his chamber, which was missed before defendant came home. It was shown in testimony that the plaintiff had been in particular habits of intimacy with the said Elizabeth Geltner, and actually courted her at that time in marriage.

To prove the contents of the bag, the plaintiff was offered to give testimony of this fact simply on the authority of the case in 12 Vin. 24. Party allowed to prove the contents of a box delivered to a carrier; and 12 Vin. 25. The Court strongly inclined to receive the plaintiff to this single point, from the necessity of the case, but gave no public opinion thereon, as the defendant's counsel admitted the contents of the bag, and superseded the necessity of the plaintiff being sworn.

It was contended on the part of the defendant, that he was not liable for this money, it not having been delivered into his actual custody, and cited Bull. 73. 8 Co. 32 b.

For the plaintiff were cited Cro. El. 622. 2 Espinasse, 407, 367.

By the Court. There is no evidence of a conversion, which is the gist of an action of trover, so that on that count the plaintiff must fail. But whether the defendant is chargeable on the general custom as an inn-keeper, is the question. On principles of law, an inn-keeper is liable for whatever is deposited in his house, and this on grounds of the soundest policy and public convenience. But the true point in the case is, whether the plaintiff did not repose his trust and confidence in Elizabeth Geltner, whom he was courting, and to whom he had always heretofore trusted his money for safe-keeping. If the jury are satisfied that he did, then the case is taken out of the general rule, as he did not rest on the security of the inn; if otherwise, the verdict should be for the plaintiff.

Verdict for defendant.

Messrs. Sergeant and Ingersol, *pro quer.*

Messrs. Lewis and Rawle, *pro def.* [See 14 Johnson, 126.]

RESPUBLICA *vs.* WILLIAM COATES, Esq.

Where the state affects delay, the Court will assign a day for the trial. Amendment of declaration shall not delay or injure the defendant.

THE declaration in this cause having been amended, a *venire* had issued for the trial. Several terms ago, upon the prosecutor not bringing on the cause to trial, the Court (according to the authority in the case of *Regina vs. Banks*. 6 Mod. 246, 247) had assigned a day for the trial. The defendant was now desirous that the cause should be brought on, which the counsel for the prosecutor opposed, and urged that the former rule was virtually vacated by the amendment of the *narr*; and compared it to the case *Dall.* 405, where it was held that on a rule for trial or *non pros.* and a plea being added, and particular facts referred, and a report made, that the subsequent plea and reference virtually vacated the previous rule for trial or *non pros.*; and that it was necessary a new plea should have been put in according to *Dall.* 465, and that as defendant was not compellable now to try, neither should he have it in his power to compel the state to bring on the trial. *E contra.* was cited, *Dall.* 410, that a rule for trial or *non pros.* is kept up by a general continuance, and no new notice is necessary; and it was contended that the prosecutor should not take advantage of his own application, and the indulgence of the Court at the last term.

The Court recommended it to the defendant's counsel to consent to postpone the cause, as the bringing it on at this term would end in a discontinuance, the state being unprepared, and only serve to turn the party round to the bringing of a new suit. But the counsel declining so to do, the Court observed that they found themselves constrained to order on the cause, and that the prosecutor could not avail himself of the act of the Court last term in his favor, upon his own application, to do an injury to the defendant.

The cause being ordered on, the suit was discontinued.

Mr. Moses Levy, *pro quer.*

Mr. Lewis and Mr. Sergeant, *pro def.*

JOHN MARSHALL *vs.* JAMES CAMPBELL and RICHARD FULLERTON.

In special assumpsit for the delivery of wheat or other specific articles, the general measure of damages is to give the difference between the price contracted for and the price at the time of delivery. But this is a general rule which implies exceptions according to the circumstances of the case.

SPECIAL assumpsit, to restore 1200 dollars in final settlements and a depreciation certificate of 182*l.* 7*s.* 7*d.* on demand, or certificates of the like kind. It turned out in evidence that these certificates were deposited by the plaintiff with the defendants to secure the payment of certain sums due by the plaintiff and one Robert Allison and Edward Spear, for goods sold to them; and it was contended that Campbell, one of the defendants, had parted with them previous to his sailing for England, before the period of the limitation of their credit. The value of certificates in Philadelphia was proved to have been in June, 1784, from 2*s.* 6*d.* to 3*s.* in the pound,—from 3*s.* 4*d.* to 3*s.* 6*d.* per pound in December, 1784, and after the passing of the funding act, on the 16th March, 1785, they rose to 6*s.* per pound. Depreciation certificates, with interest paid up, were proved to be now sold at 15*s.* per pound,—and final settlements, with interest paid to March, 1788, at 17*s.* per pound. The question was, What damages the plaintiff was entitled to recover. It was said for the plaintiff that as the defendants had sold the certificates in their own wrong, and against the terms of their original contract, that they are bound fully to indemnify the plaintiff, and that nothing but the present value of the certificates could make him whole, deducting such sum as might be due on the original contract for the goods, and cited Law of Damages, 52, that jury are to give damages according to the circumstances of the whole case. 2 Vern. 394. Where one is bound by bond to transfer 300*l.*

East India stock before 30th September then next, though the stock was much risen, the defendant was decreed to transfer the 300*l.* stock in specie, and to account for all dividends from the time it ought to have been transferred.

But to this it was answered, and so mentioned to the jury by the Court in their charge, that the measure of damages in contracts to deliver wheat and other articles had been heretofore settled by the Court, and the rule was to assess the difference between the value of the article when it was to be delivered and the price at the time of contract; that it was so fixed in the case of *Cox vs. Fox*, and *Lewis & Sons vs. Carradan* (the notes of the Court's opinion in the latter case having been read to the jury and hereto subjoined), and that on the whole circumstances of the present action, the rule of decision seemed applicable thereto.

The jury found a verdict for the plaintiff for 169*l.* 13*s.* 2*d.* damages.

Messrs. Bradford and Coxe, *pro quer.*

Mr. Lewis, *pro def.*

[Copy of the chief justice's notes of the Court's opinion, 20th April, 1786. *Inter Lewis & Sons vs. Carradan*: —]

"By this contract, defendant was obliged to deliver 1,000 bushels of wheat on 10th of October, 1781, at 4*s.* 6*d.* per bushel. If wheat rose in price, still he ought to have delivered it, or pay the difference of the price; for if, after the day of delivery, wheat had fallen in price, the plaintiff was not obliged to receive it and pay the 4*s.* 6*d.* per bushel, as it was not delivered on the day. Therefore he would not have been bound by the contract, but entitled to receive his 75*l.* and interest back again, and not to take wheat in lieu of it at 4*s.* 6*d.* The rule or measure of damages in such cases is to give the difference between the price contracted for and the price at the time of delivery. This is the rule in our opinion, but it is like all other rules, a general rule which implies exceptions. As in this case, or any other, particular or additional damages may be given in evidence.

"If the plaintiffs could prove that their mill was out of employ for want of this wheat, or that they had made a contract to deliver a quantity of flour, which, for want of this wheat, they could not comply with, and thereby sustained a loss, either in the profit they would have made, or by damages awarded against them for non-compliance, or any other special matter, it ought

to be given in evidence. Cases cited *pro quer.*: 5 Vin., 510; 1 Plowd., 290; 1 Inst., 92; 2 Vern., 97, 280, 394, 424. *Pro def.*: Law Evid., 194; 1 Cha. Cas., 209; Bull. Ni. Pri., 32, 132; 2 Vern., 415; 1 Burr., 1167.

"Verdict *pro quer.* for 155*l.* damages, and 6*d.* costs."

PETER WIKOFF et al. *vs.* ELLISON PEROT et al.

Defendant cannot withdraw a plea at the time of trial, to give him the benefit of conclusion to the jury.

CASE. Defendants' counsel moved to withdraw their plea of non-assumpsit, and rely on their plea of payment alone (apparently to have the benefit of conclusion to the jury), but it was opposed as contrary to all practise. The Court thought that the application was not made in time. They would not decide that there was no case wherein a party might not be permitted to withdraw a plea at the bar; but this clearly cannot be done in the present instance.

Messrs. Bradford and Ingersol, *pro quer.*

Messrs. Lewis and Wilcocks, *pro def.* [See 3 Binn., 589.]

VICARY's Executors *vs.* Ross et al.

Bill of lading signed by the captain of a ship at a foreign port, was allowed as evidence in a suit by his executors against the owners, to show the usage of trade at that port.

SUIT by the plaintiffs, as executors of captain John Vicary, for wages due to the testator as commander of the ship Diligent. A bill of lading of sugars, coffee, &c., signed by Vicary at Leogane, 30th August, 1783, expressing them to be received on board the ship, and to be delivered at Nantz on payment of certain freight, besides the customary average and primage, was offered in evidence by the plaintiffs, to show that, agreeably to the usage of that trade, the captain was entitled to certain privileges.

This was opposed by the defendant, as the captain could not by his own signature constitute such proof for himself. The Court overruled the objection, and allowed the evidence to go to the jury, as it was a mercantile case, and there could be no intention to fabricate the evidence for this express purpose.

Messrs. Rawle and Du Ponceau, *pro quer.*

Messrs. Moylan and Mifflin, *pro def.*

RHEINHOLD et al. Indorsees vs. JOHN DEERTZELL et al.

In a suit by indorsees of a bill of exchange against the drawers, evidence cannot be received that it was customary to draw such bills as agents to a fund, and that no recourse could be had to the drawer, under this special signature. A negotiable bill passes under the credit of the drawers.

SUIT on a bill of exchange for 2,000 guilders, dated 7th March, 1785, drawn by defendants at Philadelphia, in favor of Philip Odenheimer, on Daniel Havert de Travert, Esq., near Rotterdam, indorsed to Loppenburg and Schmierman.

An objection was made at the trial, that the indorsement was made to Loppenburg and Schmierman alone, and that the suit could not be supported with the superadded name of Rheinhold. Upon the argument, it was agreed that the cause should go on, and the point be reserved for future consideration.

The defense set up on the trial was, that the signatures were made by the defendants to the bill of exchange with the letters "q. q." superadded to their names, respectively, meaning (as was conceived by the counsel) *qualitate qua*, i. e. in the capacity of agents to the person on whom the same was drawn. It was urged and offered to be proved that the custom of the Dutch merchants in Holland and West India islands was, that the persons who drew such bills were not relied on for payment, but that the credit was given to the fund or estate on account whereof the persons drew, and that this being understood by all parties in the purchase of such bills, no recourse could be had against the drawers. But the Court declared that there could not be even a pretense for such custom in the present instance, the bill being drawn in Philadelphia; besides, the general law of bills of exchange, now universally understood throughout the maritime parts of Europe, cannot be altered by the practice of Dutch agents for sugar plantations. The bill on the face of it purports to be a general negotiable bill within the custom of merchants, and any person in the course of trade would make no difficulty in receiving such a bill, provided he was assured of the solvency of the drawer. It would tend to gross deception, and the greatest inconveniences would result to the commerce of the country from establishing any such distinction as is contended for. The jury found a verdict for the plaintiffs for 456*l.* 5*s.*

Messrs. Lewis and Moses Levy, for the plaintiffs.

Messrs. Ingersol and Sergeant, for the defendants.

Lessee of EZEKIEL THOMAS et al. vs. JAMES CUMMINS.

One brought in on attachment, and purging himself of the contempt on interrogatories, shall be discharged.

THE defendant having been brought in by attachment for a contempt during the last term, and having entered into recognizance with security for his appearance on the second Monday of this term (1 Bac., 182), to answer to interrogatories to be exhibited against him within the first four days of the term, agreeably to the rule of the Court, now appeared in proper person, and having answered to the interrogatories upon oath, and purged himself of the contempt, was discharged by order of the Court.

Messrs. Sergeant and M'Kean, *pro quer.*

Mr. Bradford, *pro def.*

M'CULLOCH'S CASE.

Court will not make a rule respecting a sheriff's sale of lands when the deed has been acknowledged at a precedent term, without opposition.

MR. SERGEANT moved for a rule on the purchaser to show cause why the sale of a house and lot in Philadelphia, late of captain M'Culloch, should not be set aside, by reason of the improper conduct of the sheriff at the sale. But it appearing to the Court that the sheriff had acknowledged at a precedent term the deed in open Court, and no opposition had been made thereto, the Court declared that they could not grant the rule, and observed that it would greatly affect sheriffs' sales if such practise was gone into. If the sheriff has misbehaved himself in his office, the remedy of the party injured, after the deed has received the sanction of the Court, is confined to the sheriff alone.

BARBARA J. ENGLEFRIED vs. FRED. WORLPART et al. Executors.

Devise to three of the testator's children in Germany, of one-sixth part of the residue of his estate to each, "provided that they, their children, or grand children shall transmit proofs to the executors within six years after testator's death, of their being alive, and after the said six years no proof to be admitted; but the said residue shall be equally divided among such of his children and grand children as can make such proof, *and* shall have made it within the aforesaid space of time." Proof was made within the time, but was inevitably prevented from being sent forward. Adjudged that such devisee was entitled to his residuary share, and the word *and* shall be construed *or* to effectuate the testator's intention.

THE following case was stated for the opinion of the Court, William Englefried, having three children in Germany by one venter, and two other children in Pennsylvania by another venter, died, having first made his last will dated December 3, 1781 (and proved the 28th December, 1781), whereby he empowered his executors to sell his real and personal estate, and, after payment of debts and funeral expenses, he devises one-sixth part of the residue to his five children, and one-sixth part to his late wife's sister, Christiana Knees. To each of the legacies to his children in Germany he superadded the words, "and in case of his (or her) death, to his (or her) children or grand children." And in the close of the will comes this clause: "Provided always that my said three children, Carl, Philip, and Barbara, whom I left in Germany, or the children or grand children of any or either of them who is now dead, or the guardians of such children or grand children, shall within the space of six years from the day of my decease, transmit to my executors authenticated proofs of their being alive, and that without such proofs no part of the residue of my estate shall be paid or remitted to them my said children or grand children in Germany, and after the expiration of the said term or space of six years no proof shall be admitted, but the said residue shall be equally divided among such of my children and grand children as can make such proof, *and* shall have made it within the aforesaid space of time." It was mutually agreed that the plaintiff was the daughter of the testator, then living in Germany, and that the proofs required by the will of the testator were made out in Germany, and put into the hands of Ernat Bashe, for the purpose of being transmitted to the executors, the defendants, in the month of March, 1787, who was prevented by inevitable accident from reaching Philadelphia, and delivering the same to the executors until the 4th day of August, 1788, when the same were delivered, which was more than six years after the death of the testator and the probate of the will. If the Court should be of opinion on these facts that the plaintiff ought to recover, then judgment to be given according to the verdict of the jury: otherwise to be entered for the defendant as in the case of a nonsuit.

The case was argued at the last April term by Messrs. Ingersoll and Swift for the plaintiff, and Mr. Bradford for the defendant.

On the part of the plaintiff four points were made: 1st, That the proofs required by the will were not a condition precedent. 2d, That the condition had been in substance complied with. 3d, If the condition had not been exactly complied with, it was the effect of inevitable accident, which would be relieved against. 4th, The condition was never intended to disinherit the testator's children in Germany, but only to quicken their application for their distributive shares, that the estate might be settled within six years after his death.

As to the first point, it was contended, that the construction of the will was to be governed by the testator's intention. Cro. El. 219. It is apparent from the whole of the will, that the testator meant an equal division of his property among all his children. He endeavors to guard against the lapse of the legacies to his children in Germany, by limiting them to be paid, in case of their death, to their children or grand children respectively. There are no particular technical words in a will to determine what is a condition precedent or subsequent, but the intention of the testator is to control. Talb. Cas. 164, 166. The civil law makes no distinction, in personal legacies, between conditions precedent and subsequent, nor does the Court of Chancery in cases of money devised on marriage with consent, where there is no devise over. 2 Equ. Cas. Abr. 215, *in notis*, 3 Atky. 32. In this instance the executors were interested in suppressing the intelligence of the conditions in the will to the legatees in Germany, though by their office they were bound to give notice thereof. [*Sed vide contra*. Fry vs. Porter 1 Vent. 201, 204; Raym. 236; 1 Mod. 86, 300; 2 Keb. 756, 787.]

To the second point, was cited 2 Equ. Cas. Abr. 213, pl. 4. When a condition has been formed in substance, equity will supply small defects.

As to the third point, it was urged, that in cases of great unforeseen events, which common prudence or discretion would not generally guard against, the law will, in a variety of instances, grant relief; as in Pollard vs. Shaffer, Dall. 215. Where injury had been done by a public enemy to a sugar house, &c. leased for years, the tenant will be excused from a general covenant to deliver up the premises in good repair, because such an event was not within the contemplation of either party. So the law implies an exception in favor of a common carrier, where goods are lost by inevitable accident. A condition precedent being

only in nature of a penalty, the intent of a trust shall be regarded, though the condition was not performed within the time limited. 1 Equ. Cas. Abr. 107, pl. 1. A forfeiture shall not bind where a thing may be done after, or a compensation made for it, as where the condition is to pay money, &c. 1 Equ. Cas. Abr. 108, pl. 3. One having three daughters, devises lands to his eldest, upon condition that she within six months after his death, pay certain sums to her two other sisters, and if she failed, he then devises the land over to his second daughter on the same condition; equity may enlarge the time for payment, though the premises are devised over (because it lies in compensation, though a condition precedent), 1 Equ. Cas. Abr. 109, pl. 5. Devise to a kinsman paying 1000*l.* apiece to his two daughters (his heirs at law); devisee makes default, the premises are recovered in ejectment by the two daughters, yet the devisee was relieved on payment of principal, interest, and costs, though to the disinherison of the heirs, and in favor of a voluntary devisee. 1 Equ. Cas. Abr. 109, pl. 8. Being beyond sea will excuse against outlawries. Cro. Jac. 226. One shall not loose his estate without notice of a proviso contained in a deed or will, that he should not disturb the executor. 8 Co. 92*a*, 100. 4 Co. 79*b*. Forfeitures are odious in law: whoever will take advantage of them, must give notice to him who is to forfeit. 3 Term Rep. 172. If a condition be to do a thing upon performance of an act by the feoffee or obligee, which is secret, and lies only in his breast, the performance of the condition is excused, till feoffor or obligee gives notice that he has performed the first act. 2 Comy. Dig. 461, L. 8, 462.

The fourth point was said to be obvious on the face of the will. Chancery makes no distinction between conditions precedent and subsequent in such a case. 2 Vern. 222. By construing the condition to be subsequent, the manifest intent of the testator is effectuated, but is destroyed by calling it a precedent condition. The devise to the plaintiff is a vested interest, which the testator intended should take effect if she was alive, or in case of her death should go to her children or grand children. The will directs, that the legatees in Germany should transmit to the executors proofs of their being alive within six years. Such proof was actually transmitted by the plaintiff, but a public enemy prevented the receipt of the authenticated papers. Upon a rigid literal construction of the will, it may be said, that in case of the proofs not being sent in to the executors within six years, the share of such legatee not sending in such proof is to go over to the legatees in Germany, who shall have strictly

complied with the will. But supposing that none of the children in Germany, owing to great public causes, had transmitted their proofs within the six years, and after that period had elapsed, the executors had received their proofs, who could have taken advantage of the forfeiture? Not the children by the second venter, because that construction would militate against the express words of the will. In such case, therefore, the time of proof must necessarily be dispensed with, or the intention of the testator would be clearly violated. It may be urged, that equity may enlarge the term in a condition, where compensation may be made by payment of money, but not otherwise: but to this it may be answered, that where no injury or loss has accrued, there can be no idea of compensation. What compensation can possibly be looked for in the present instance, where the laches is not imputable to the plaintiff?

It was argued on the part of the defendants, 1st, That the proofs were a condition precedent to the taking of the legacy. 2d, On failure of such proofs, there was a devise over. 3d, The condition does not lie in compensation after forfeiture.

That the condition was precedent, and that there was a devise over on non-performance thereof, it was said, was evident from the words of the will. No part of the legacies was to be paid or remitted to the children in Germany without such proof, and after the space of six years no such proof was to be admitted, but the residue was to be equally divided, &c. It is the right and liberty of the subject who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleases. This will be universally allowed. It is also a fixed and settled maxim of law, that if an estate is limited to commence on a condition precedent, nothing can vest or take effect till the condition is performed, and this is so strong and settled a point, that it holds though the previous act was at first impossible, or after becomes impossible by the act of God, or other accident, the estate can never vest. 2 Equ. Cas. Abr. 216, pl. 12. *in notis.* Co. Lit. 206, 219.

The executors were not bound to give notice. The limitation in the will requires that the children in Germany should come forward within the stipulated period with their proofs. Where no one is bound to give notice, no notice need be given. When the six years were elapsed, it became the duty of the executors to settle and divide the estate.

In all cases that lie in compensation, equity may dispense with the time. 5 Vin. Abr. 93, pl. 9.

If an estate is to vest on the intermarriage of A and B, and the condition become impossible by the act of God, as in case A had died within the three years limited for the marriage, or soon after the death of the testator, Holt, C. J. thought the estate would never arise, and that there would be no relief in that case. 5 Vin. 93. pl 10. 2 Vern. 340. Where a condition is precedent to the vesting of an estate, chancery cannot relieve in the case of non-performance: otherwise, in case of a forfeiture for which a valuation can be made and compensation given. 5 Vin. 93. pl. 11. 1 Salk. 231. pl. 10.

A seized in fee having three daughters, devised to trustees to convey to the eldest if she shall pay 6000*l.* to her two sisters in six months; and if she shall not, then he gives the like pre-emption for the same time to the second; and if she shall not, then to the third. The money must be paid punctually at the time, and equity will not enlarge it. 5 Vin. 93. pl. 12. Equity will not relieve against the breach of a condition precedent, where the damages accrued are contingent and cannot be estimated. 5 Vin. 93. pl. 15.

The chief justice delivered this term the opinion of the Court, after stating the will and case.

The question is, What is the meaning of the will? for on the intention of the testator the construction of the will must depend. 1 Wms. 666. 2 Wms. 673.

The testator had five children and a relation of his late wife, dependent on his bounty. He gives to each one-sixth part of the residue of his estate, with a proviso that his three children in Germany, their children or grand children, shall transmit proofs to his executors within six years after his death, of their being alive. It is admitted that the proof was made by the plaintiff within the period limited by the will, but inevitable accident, arising from the public measures in Europe, prevented their being sent forward. Each child was equally the object of the testator's bounty. The clause in the will must have been inserted to quicken the application for the money, by such of his children who lived in Germany. It cannot be conceived that under all possible events, the testator meant to deprive them of their portion of his property if the proofs did not come over in time, when they were prevented from sending them forward by inevitable accident. It is immaterial whether the condition be construed precedent or subsequent. We must regard the evident intention of the testator, and to effectuate this intention we will construe the copulative "and" in the latter part of the proviso as the disjunctive "or," which will fully entitle the plaintiff to recover. The word "or"

in a will, has been rejected, and the word "and" construed "or," and the word "or" construed "and," to comply with the intent of the testator.

2 Stra. 1175. Pollex. 645. 2 Vern. 388. 1 Wils. 140. 3 Atky. 390. So the word "and" has been construed "or," in a lease. 1 Leon. 74. And the word "or" has been construed "and" in an act of parliament. 1 Vent. 62.

Judgment *pro quer. per tot. cur.*

RESPUBLICA vs. MATTHEW CLARKSON, GEORGE HUGHES, RICHARD BACHE, PETER BAYNTON, and DAVID LENOX, Commissioners of JAMES NEWPORT, a bankrupt.

Court will not compel commissioners of bankrupt to give a certificate of conformity, though they should differ from the commissioners.

MOTION at a precedent term, and rule for a mandamus to the defendants as commissioners of bankrupt, to give a certificate of conformity to James Newport, or show cause to the contrary.

The commissioners made a general return, that there appeared to them reason to doubt that the discovery and disclosure made by the bankrupt, was a true, full and perfect discovery and disclosure of all the estate and effects of the said James Newport.

It was now moved, that the return was insufficient, because uncertain. Under the act "for the regulation of bankruptcy," passed September 16th, 1785, p. 653, sec. 24, the bankrupt was entitled to receive a certificate from the commissioners on his conforming to the directions prescribed by the act; and the supplement to this law, passed March 15, 1787, p. 237, sec. 3, directs that he shall be discharged on such certificate, when allowed by the president or vice-president of the supreme executive council. The return to a mandamus must be certain in every respect, and therefore it is not sufficient to offer such matter as the party may falsify in an action, but also such matter must be alleged, that the Court may be able to judge of it, and determine, whether the party's conduct be agreeable to law or not. 3 Bac. Abr. 542. Cites 2 Salk. 432, pl. 11. Lord. Raym. 559. Vent. 111.

Mandamus to swear one into the place of town clerk; the return was, that upon the election, B had eighteen voices, and the party who sued the mandamus but seventeen, and that they had sworn in B. It was held a bad return, being argumentative,

when it should be express and direct, that he was not chosen (6 Mod., 309). So on a mandamus granted to restore the recorder of Barnstable, directed to the mayor, and he returned *quod non constat nobis* that he was ever elected; and the return was adjudged insufficient, and restitution awarded (T. Raym., 153).

The return should be special; as in the case of the *King vs. Mayor of Durham*, where a freeman is disapproved of, a good reason for so doing (1 Burr., 127). This Court have a superintendent jurisdiction over every inferior jurisdiction, and will in such cases exercise the same powers as the Court of King's Bench in England, who are never excluded unless by the express words of a statute. The return of the commissioners should be stated in such a manner as to enable this Court to determine on the legality of their proceedings, and to rejudge their judgments. On the present return, no issue can be formed, no fact can be brought to trial. The power of the commissioners is absolute by these means; and a man may be hung up in suspense during his whole life, without having the privilege of being heard before another tribunal, in his own defense. The idea of conformity must be gathered from the original act and supplement; but ought the commissioners solely and exclusively to judge, without appeal, respecting it, on the facts? They should either approve or disapprove of the bankrupt's conformity. But if they have jealousies and suspicions, why are they not particularly expressed? Lord Chancellor Hardwicke, on a petition to him to disallow the certificate of one Williamson, a bankrupt, formerly a merchant of Cork, in Ireland, declared that he himself had very great jealousy and suspicion concerning the view with which the commission was taken out, but declared they were not sufficient to proceed upon.

On the part of the commissioners, it was urged that the return being in the express words of the supplement to the act, "for the regulation of bankruptcy," must be clearly sufficient. It was by no means argumentative, but precise and express. They are not bound by law to make any special return, or to state their particular doubts or suspicions, or the grounds of them. Under the first law, the commissioners were required to give a certificate of conformity to the bankrupt, though they had the strongest reasons to disbelieve the truth of his discovery and disclosure. Under the latter law they are to exercise a reasonable, not an arbitrary, discretion, and determine on their oaths whether, under all the circumstances, it appears to them there has been a candid and ingenuous account given to them by the bankrupt, on his different examinations. The supplement nearly pursues

the words of the statute (5 Geo. 2, c. 30, sect. 10), in England ; except that therein four parts in five, in number and value of the creditors, for not less than 20%. respectively, who shall have duly proved their debts under the commission, shall sign the certificate and testify their assent to the allowance thereof. As the bankrupt laws now stand in Pennsylvania, the discretion of the commissioners is intended to be exercised for the benefit of the creditors, and, in this instance, is exclusive, for they must exercise their own private judgment. Suppose a fact was tried by a jury on an issue joined, or that the Court on a special statement returned by the commissioners, should think there was a true discovery and disclosure of the bankrupt, and doubts still remained in the breasts of the commissioners of the truth of them ; would this Court compel them to certify against their own judgment ? Could they be deemed to be in contempt when they come forward and say, " We have taken an oath or affirmation, faithfully, impartially, and honestly, according to the best of our skill and knowledge, to execute the powers and trusts reposed in us ; and under that solemn sanction declare, that we heretofore had, and still have, reason to doubt that the discovery and disclosure of the bankrupt is not true, full, and perfect. Our consciences and judgments still remain unsatisfied ? "

No mandamus will lie to an inferior Court, to compel them to give a particular judgment, though they may be forced to give a judgment.

The Court, upon the argument, were of opinion the rule should be discharged, as they could not legally compel the commissioners to sign the certificate of conformity, even though an issue should be found in favor of the bankrupt, or the Court, on a special statement of the facts, should differ from the commissioners, whether there was a full, true, and perfect discovery and disclosure on the part of the bankrupt. If any inconveniences should arise from this doctrine, the legislature only are competent to the remedy.

Messrs. Lewis, Sergeant, Fisher, and M'Kean, *pro repub.*

Messrs. Bradford, Wilcocks, and Tilghman, *pro def.*

See 1 Atk. 82, where Lord Hardwicke observes : " Certificates are matters of judgment, and I do not know that a mandamus would lie to compel an allowance ; for it is discretionary in the commissioners first, and afterwards in the Lord Chancellor ; and yet it ought not to be arbitrary either in the commis-

sioners or the chancellor to say we will, or we will not, allow a certificate; but they ought to be governed entirely by fairness or fraudulent behavior in the bankrupt."

MARTHA STEWART (landlord) *vs.* THOMAS MARTIN (tenant).

When between landlord and tenant justices of the peace do not allow a reasonable time to the tenant to procure his testimony, Court will set aside their proceedings.

THE proceedings in this case were removed by *certiorari*, from the county of Luzerne.

It appeared by the affidavits of the defendant, and Rosewell Wells, his attorney, produced to the Court, that the defendant had a material witness, one Mrs. Annis, resident in Newtown, in the state of New York, whom, by reason of the shortness of the time from the service of the summons to the day of trial, he could not subpoena, and that he offered to verify this by affidavit to the justices, to induce them to postpone the trial; but the justices refused his prayer, and went on immediately to trial, and issued execution, founded on the verdict of the jury, for 5*l.* damages and costs, and also a writ of possession of the premises.

A motion was now made to set aside the proceedings.

Per Curiam. Justices of the peace, in cases of landlord and tenant, have great and extensive powers. The act giving them jurisdiction, evidently intending to give the landlord *festinum remedium*, we have adopted the rule, that a *certiorari* is no *superedeas*,* founded in principles of general convenience. But we will always examine such proceedings narrowly, and, to effectuate this purpose, we must of necessity call in the aid of affidavits.

In the present instance, it appears to us that the justices did not allow a reasonable time to the defendant to procure his testimony from the state of New York, which he offered to swear was material for him. This is so strong an act of injustice, that we find ourselves constrained to set aside all the proceedings since the general issue pleaded, and award the restitution as well of the premises as of the 5*l.* recovered as damages.

Mr. Lewis, *pro quer.*

Messrs. Bradford, Ingersol, and Sergeant, *pro def.*

* *Novis writ of error.* 6 Blinn. 641.

SEPTEMBER TERM, 1791.

PRESENT — M'KEAN, CHIEF JUSTICE. SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

[MEMORANDUM.— During the vacation, the Honorable William Bradford, jr., Esq., was appointed one of the justices of the Supreme Court, *quandiu se bene gesserit*, on the 20th day of August, 1791. Jared Ingersol, Esq., was appointed attorney general on the 22d day of August, 1791. Both commissions were published in the Supreme Court, September 5th, 1791.]

Lessee of MICHAEL JOY et al., assignees of CHRISTIAN WIRTZ, a
bankrupt, vs. THEOPHILUS COSSAET.

To warrant a commission of bankrupt there must be a *trading, a debt contracted*, and an act of bankruptcy subsequent to the 16th September.

Persons interested may contest the legality of the petitioning creditor's debt; but question whether creditors who have received a dividend under the commission are not estopped?

THIS cause came before the Court at the last term, on a motion for a new trial, founded on a supposed misdirection of the Court to the jury. The case appeared on the trial as follows, being stated by the chief justice.

The lessors of the plaintiff claimed title to a house and lot in the city of Philadelphia, as assignees of the commissioners of bankruptcy of the estate of Christian Wirtz, a bankrupt. The defendant showed title to the premises under a deed dated 30th June, 1787, from the said Wirtz to Dr. Charles Moore. This deed was made *bona fide*, for a valuable consideration, and without notice of any act of bankruptcy. On the 22d May preceding, Wirtz had executed a deed for two other lots to Philip Wager and wife, she being a daughter of said Wirtz, without any consideration in money.

It was contended, on the part of the plaintiff, that this deed was not only void and fraudulent as to creditors, but an act of bankruptcy.

The counsel for the defendant insisted that this deed did not constitute the crime of bankruptcy, though void against creditors; that Wirtz had never given any thing with his daughter in marriage, and by this deed conveyed the two lots, not worth more than 200*l.*, without any intention of fraud.

They further relied on an exception to the plaintiff's title, that the petitioning creditors, Joy and Hopkins, had no right to

apply for a commission against Wirtz, because no part of their demand accrued after passing the act of assembly respecting bankruptcy. The last item of their account is charged on the third of June, 1785, and the law was enacted on the 16th September, 1785.

To which it was replied, that the fact as to the last item was true, but that Wirtz, on the 3d of June, 1786, gave a note on the back of the account, promising to pay, with interest, which was a contract or transaction subsequent to the passing of the act, and out of the proviso; and that were this otherwise, no person but the bankrupt could take advantage of it.

The Court left it to the jury to determine whether the deed of the 22d May, 1787, under all the circumstances given in evidence, was an act of bankruptcy; and if they should conceive it was, which was very probable, yet the Court inclined to the opinion, that the debt of the petitioning creditors did not arise after the passing of the act of assembly; and that the subsequent note on the account could not be sued as a promissory note, not being negotiable, and that it did not bring their debt within the meaning of the act; also, that the defendant had a right to take advantage of this, as well as the bankrupt.

However, if the verdict should be for the defendant on these grounds, the Court reserved these two points for further discussion, in case the plaintiff should think proper to move for a new trial.

Verdict for defendant.

The motion for the new trial was argued at the last July term, by Messrs. Lewis, Tilghman, and A. Morris, for the plaintiff, and Messrs. Ingersol, Sergeant, and Rawle, for the defendant.

It was urged, on the part of the plaintiff, that a bankrupt was considered as a criminal in the eye of the law, and it was therefore necessary that the act for regulation of bankruptcy should not have a retrospective view. The proviso in the act (3 State Laws, 645) that the debt or demand must have arisen after the passing of the act, was introduced for the benefit of the creditors, or at least of the bankrupt himself. But the maxim is *quisquis potes renunciare juri pro se introducto*. The whole system of policy respecting the bankrupt acts, was evidently grounded on the interest of the creditors in general, and not of any individual purchasers, however fair or honest. The preamble of

the act fully proves, that the object of the legislature was to divide the whole property of the bankrupt ratably among his creditors, from the time of the act of bankruptcy committed. All the acts of bankruptcy are to be construed favorably for creditors, and so as to suppress fraud. 1 Burr. 474. The management of the bankrupt's estate, and an equal distribution of the property amongst the creditors, are the two main objects which the whole bankrupt law has in view. Ibid, 476.

The doctrine of relation in case of a sale after an act of bankruptcy committed, is established, to prevent fraud; and though it may sometimes occasion particular inconveniences, yet it is considered as conducive to the general good of the public. The statutes make all conveyances and acquisitions of property void, by, from, or under the bankrupt, and the property of the assignees to be good and valid. 1 Blackst. Rep. 68.

The memorandum indorsed on the account altered the nature of the debt, from Wirtz to Joy and Hopkins. It gave them a new remedy, for under it they might have brought *insimul computasset*. It is substantially as much a debt or demand, which has arisen on a contract or transaction subsequent to the passing of the bankrupt law, as the case of a bond given for a debt previously existing; and the practise has been frequent to enter into voluntary bonds for old debts, for the very purpose of obtaining a commission. Dall. 389, 386.

But should this point be doubtful, or the law clearly otherwise, the plaintiff's counsel contended that no one but the bankrupt could take advantage of it. On a suit brought by the assignees of a bankrupt for a debt justly due to him, objection was made by the defendant, that the debt of the petitioning creditor being created above six years previous to the application for the commission, could not warrant the subsequent proceedings; but the Court overruled the objection, saying it did not lie in the mouth of a third person to make the objection; the bankrupt alone could do it, but he has waived it by appearing, and submitting to the commission, and being examined under it; and this amounts to an acknowledgment of the debt. 5 Burr. 2628. A third person shall not take advantage of a petitioning creditor's debt. 1 Term Rep. 407.

It was insisted, on the part of the defendant, that the debt of the petitioning creditors was not a sufficient ground for awarding the commission, it not being a debt or demand which had arisen on a contract or transaction subsequent to the 16th September, 1785. The last item of the account of Joy and Hopkins is charged on the 3d June, 1785. The subsequent agreement in-

dorsed thereon gave the parties no new right or remedy. An action of debt could not be maintained on it; nor could it be sued as a promissory note, as it did not specify any certain sum, agreeably to the act of assembly passed 28th May, 1715. (Old ed. of Laws, p. 58.) It is true, the memorandum would support *insimul computasset*; but this species of action, it has been resolved, gives no new right; it only ascertains an old one. 1 Salk. 207, 208. S. C. cited Sayer's Law of Costs, 88. Taking a note from a bankrupt does not preclude the original demand, unless the party should be guilty of negligence. 1 Term Rep. 408. And legislative interference was found necessary in this very matter. *Ibid.* The subsequent agreement amounts merely to an acknowledgment of a preceding debt, and to pay interest. It cannot be compared to a bond, which extinguishes the original debt, and gives the party a superior remedy.

As to the latter point, a great variety of cases may be cited from the books, to show that in England the proceedings on a commission of bankruptcy are open to full investigation by all persons interested therein. Such are 1 Term Rep. 573. 2 Blacks. Rep. 728. 2 Stra. 744, 1004. Cowp. 398, 427. 2 Wils. 354. The same doctrine has been solemnly determined in the Common Pleas of Philadelphia county, after the fullest argument. Dall. 381. But it is said for the plaintiff that none but the bankrupt can make objection to the legality of the petitioning creditor's debt. If the law were so, it would certainly be put into the power of a bankrupt, by collusion with a creditor, to defeat the just right of any fair purchaser. And why should a third person have it in his power to examine and controvert every proceeding from the commission of bankruptcy commencing, except the petitioning creditor's debt, when the interests of such persons are to be affected?

The following requisites must be proved in every suit brought by the assignees of a bankrupt: 1st, That the bankrupt was a trader within the statutes. 2d, The act of bankruptcy. 3d, The petitioning creditor's debt. 4th, The commission regularly granted. 5th, The assignment; and 6th, The property in the bankrupt. 2 Espin. 297. Bull. *Nisi Prius*, 4to ed. 37, 39, 40. Though the bankrupt acquiesce in a commission, still it may be controverted. Cowp. 823 (in *notis*). This very point was fully gone into in the case of *Pleasants vs. Meng et al.* Dall. 388.

The chief justice this term delivered the unanimous opinion of the Court. He stated the case fully as it appeared on the trial. The two points have been very fully and ably argued, and many cases have been read out of the books much to the purpose.

We think the debt of the petitioning creditors did not warrant the commission of bankruptcy taken out on the 11th October, 1788. The words of the first proviso in the 3d section of the act "for regulation of bankruptcy" are, "that the debt or debts, demand or demands, of such creditor or creditors, so as aforesaid, entitled to apply for and procure a commission to be issued against any such bankrupt, shall have arisen subsequent to the passing of this act." Now this act passed on 16th September, 1785.

It appears that the legislature were scrupulously cautious to do nothing which might in any wise affect contracts or dealings, previous to that time. To come under this law there must be a trading, a debt contracted, and an act of bankruptcy, all posterior to its date.

Now it is confessed, that the whole of the account of Messrs. Joy and Hopkins against Christian Wirtz, was prior to the date of the act, and the sole question is, whether the memorandum indorsed on the account and signed by Wirtz on 3d June, 1786, will create a debt of that date.

No action of debt could be maintained on this writing; of itself merely, it cannot raise a duty. No action will lie on it as a promissory note, because it is not negotiable. Indeed, an *insimul computasset* would lie, but that is on the old duty, and derivative. Besides, the memorandum operates no extinguishment of the debt for the merchandise sold before. It does not alter the old duty, nor does it in any degree dignify it, or give a better remedy to the parties. It therefore still remains a debt, arising on a contract prior to the passing of the law. This seems too plain to require being enlarged upon. See 2 Black. Com. 465. Dall. 389, 423.

The second point is, that this exception could be taken by the bankrupt, but by no other person. If any person is injured by a transaction between others, reason points out that he should be permitted to shew that the act was unlawful. Though the proceedings of commissioners of bankrupts in England are, almost in every stage, examinable by the Lord Chancellor, yet the trading, act of bankruptcy, commission and certificate, have been severally subjects of litigation in their courts of law, for which see numerous cases cited by the counsel, in Dall. Rep. 381, and 2 Burr. 932 and 934, which very much resemble the present case. We do not think it should be in the power of any two persons by any contrivance between them, to defeat a third person of his estate, without his concurrence or default. This would be giving an unjust operation to the act of assembly, by an *ex post facto* proceeding. How far the creditors who have

received a distribution under this commission, may be estopped from taking advantage of this exception, we need not say; but we are clear that Dr. Charles Moore is not thus precluded.

Upon the whole, the Court were unanimously of opinion, that the rule to show cause why a new trial should not be granted, be discharged.

Judgment *pro def.*

REPUBLICA vs. JAMES LE CAZE, MICHAEL MALLET, and JOHN ROSS.

Court will not grant a new trial, because the jury have exceeded legal interest in the measure of damages for delaying the payment of money, unless it be excessive. Admiralty has no jurisdiction in the case of "legal wreck." Admiralty may take a stipulation to perform a decree; and a writing, though void as a stipulation, may be good as a contract; on which, the sum being certain, debt will lie.

AN action of debt was brought, by way of information, by the attorney general, against the defendants, for 4000*l.* sterling money of Great Britain, of the value of 6666*l.* 13*s.* 8*d.* lawful money of Pennsylvania, in the debt and detinet, upon a writing signed by the defendant and taken in the Court of Admiralty of Pennsylvania, in the nature of a caution or stipulation, dated 4th November, 1783.

The information stated the whole case, and the papers recited therein, except the libel, which was stated very generally from the admiralty proceeding.

It appeared on the trial that 5285 French crowns, and 1580 Spanish pieces of eight, had been shipped in Philadelphia, by one Captain Ourree, on board the brigantine Count Durant, Captain Forenay, on account of Lewis Lanoix, of Bordeaux. The vessel was cast away in the bay of Delaware (within a mile of Lewistown), and the money taken out of her in a boat by the captain. It was brought to Lewistown, and from thence to Philadelphia. Forenay applied to the Admiralty Court of Pennsylvania to receive the cash, and filed his libel for salvage. Le Caze and Mallet applied by petition to that Court to receive the money as correspondence of Lanoix, and offered therein to give caution for the amount, deducting the salvage and expenses. A stipulation was given accordingly by Le Caze and Mallet, with John Ross as surety, under the order of the judge, conditioned to pay the money to Lanoix, or the true owner, and indemnify the judge and officers of the Court, under the penalty of 4000*l.* sterling.

The defendants pleaded payment and *nil debent*. The attorney general replied, *non solverunt*; and the issues came on to be tried in September term last, by a special jury of merchants,

when a verdict was found for the commonwealth for 3768*l.* 9*s.* 7*d.*

Seven reasons were then filed in arrest of judgment, and also a motion for a new trial; and the same were argued at great length the last July term, by Messrs. Randolph, Lewis, Ingersol, Moyland, and Mifflin, for the defendants, and by the attorney general, Messrs. Sergeant, Coxe, and Du Ponceau, for the commonwealth.

The reasons in arrest of judgment were:—

1. It does not appear, by the declaration, that the subject matter of the admiralty suit, therein mentioned, was within admiralty jurisdiction.

2. The evidence and proceedings in the admiralty show that the subject matter was properly and exclusively cognizable in a Common Law Court.

3. The stipulation was such a writing as the admiralty had no jurisdiction to take, and therefore was void in itself.

4. Debt will not lie on it.

5. It is not sufficiently stated that the silver coin was, or is, the property of Lewis Lanoix.

6. If the suit was of mere admiralty jurisdiction, and exclusive, it belongs to them to determine it.

7. The admiralty had no jurisdiction, the silver coin being in the custody of Captain Forenay.

The motion for the new trial was grounded on this, that the verdict was against evidence in finding a larger sum than was really due.

On the first reason in arrest of judgment, it was insisted by the defendant's counsel that, there being no averment in the declaration, that the suit was of admiralty jurisdiction, the same is defective. Every thing of the substance of the action must be included in the declaration. 4 Bac. Abr. 6, 7. The essence of the action is that without which the Court could not have grounds to give their judgment. Ibid, 8. Though it need not be more certain than the nature of the thing admits of. Ibid, 17.

The admiralty jurisdiction is conversant merely in maritime cases; and where the contract arises part at sea and part on land, the Common Law Courts have the jurisdiction. The Court of Admiralty is a limited and particular jurisdiction. 3 Blackst. Com. 106. Admiralty is considered of *inferior* jurisdiction, being bounded and circumscribed by certain laws and stated rules, and is subject to the control of the temporal Courts. 1 Bac. 558. In cases of Courts of limited and particular jurisdiction, holding plea of causes without their jurisdiction, defendant is

not precluded by pleading in chief from taking advantage of the want of jurisdiction: Aliter of the Courts of Westminster. Carth. 11, 12. Nothing shall be intended to be within the jurisdiction of an inferior court, but what is expressly averred or alleged to be so. 1 Bac. 562. 2 Lord Raym. 1310. 1 Saund. 74. 1 Vent. 2. T. Jones 230. 1 Sid. 95. T. Raym. 63. Cro. Jac. 95. 1 Term. Rep. 151. When plaintiff declares, he must show the jurisdiction of the inferior Court. Bull. 4to ed. 82.

To this it was answered by the counsel for the commonwealth, that though it is necessary to allege the substance of the action in the declaration, yet the jurisdiction of the admiralty is not essentially necessary to be averred in the present instance. The cases cited by the defendant's counsel are such where the judgments of the inferior Courts come *immediately* before the Courts of record, and not where by *inducement* or *recital*, which materially varies the cases. The ground of the suit, is the agreement of the defendants to pay the money over to the proper owner.

Le Caze and Mallet acted as volunteers in this whole business. They came forward by petition to the Court of admiralty, to receive the money for Lanoix, though they did not act either under an express or implied authority from him, and they offered Mr. John Ross as their security, that the money should be paid to the true owner. Here by their own conduct they freely admit and affirm the jurisdiction of the Court of admiralty. It may justly be compared to the case in 1 Wils. 819. Debt will lie on a judgment of nonsuit in an inferior Court, without alleging that the plaint was levied for a cause of action arising within the jurisdiction of the Court of London, because the now plaintiff was brought into Court by the defendant, and jurisdiction was not the gist of the suit. But a sentence of the Court of admiralty is sufficient to presume a jurisdiction, unless the contrary appear on the face of the proceedings. In applications for prohibitions before sentence in the admiralty, B. R. will examine the whole case, and see the ground of proceedings in that Court; but after sentence, the party applying must show a nullity of jurisdiction on the face of the proceedings. 2 Term Rep. 649. The same law is laid down in another case, by Buller and Ashurst; and it is there said, where jurisdiction is doubtful, it is sufficient to prevent a prohibition. Ib. 475.

But the cases cited are of inferior Courts. Now we deny that the admiralty Court of Pennsylvania can be called an inferior Court. It is true, it was first erected in Pennsylvania, on 8th

March, 1780. But it is an old Court modelled anew. It assimilates the admiralty here to that of England. It has jurisdiction of all maratime concerns on the high seas. It is said not to be a court of record, 3 Blackst. Com. 69, though it has power to fine and imprison. 1 Vent. 1.

It is arranged by Sir William Blackstone, amongst those courts of justice which are of public and general jurisdiction throughout the realm, in contra-distinction to those of a private and special jurisdiction. In England it is termed the high Court of admiralty. Every thing is to be intended in favor of the jurisdiction of Courts not of the inferior class. In *narrs* on foreign judgments, jurisdiction is never averred. Vide Dougl. 1. But admit for argument's sake, the declaration to be informal, will not the verdict cure it? Debt will lie for amercement in a Court leet, and it must be laid that the party was an inhabitant; yet, if it is not so laid, it is cured by verdict. Bull. 167.

On the second reason, it was contended by the defendants, that it appeared by the admiralty proceedings, that the coin was considered as wreck. 1st, By the memorial of captain Forenay to the admiralty to receive the money. 2d, By the order of that court. 3d, By the memorial for expenses of salvage. 4th, By the decree of the Court thereon. 5th, By the petition of Le Caze and Mallet to have the coin delivered to them on their giving security; and 6th, By the decree of the admiralty thereon, and the stipulation entered into.

Now wreck of the sea is of common law jurisdiction by the express words of the statutes, 13 Rich. 2. c. 5, and 15 Rich. 2. c. 3. To give the admiralty jurisdiction, it must be surmised in the libel that the transaction was on the high sea, and the fact must correspond. In the present libel, the place where the fact of wrecking happened, is not particularly expressed, whether on the sea, a creek, &c. There is a distinction of jurisdiction in the admiralty between the instance Court and prize Court. Locality designates the jurisdiction of the former; the subject matter designates that of the latter. Courts of common law have jurisdiction of the taking of a ship at sea, except when taken as prize. Dougl. 591, 2, 3, (in *notis*). The very term "wreck" excludes the jurisdiction of the admiralty. It is frequently used without the additional words "of the sea." 1 Blackst. Com. 290, 1, 2, 3. Here the silver was never out of the possession of the captain. If he or his crew keep possession of the goods, there is no wreck or pretense of it. 5 Co. 107. But if even the captain had been out of possession of the silver, the admiralty would not thereby acquire jurisdiction. The word "wreck" in the admiralty proceedings must be considered in its

legal and technical sense. The word "covenant" in the case in 4 Burr. 2035 was taken in the common and general sense, being used by parties not in Court. So it is used in 3 Blackst. 157, as a verbal promise. Captain Forenay did not file his libel for salvage, nor was there any necessity for going into the Court of admiralty for the purpose. Vide Parke on Marine Insurance, 149 to 156.

If the captain and seamen do not their utmost to save goods cast on land they lose their wages. Salvage is due by all laws, per Holt, Chief Justice, and may be recovered at common law, wherein the trouble, risk, and benefit to the party is to be considered. 1 Ld. Raym. 393. The word *strand* means the verge of the sea or any river; *stranded* means run on ground. Wesket, 535.

Prohibition will lie even after sentence in the admiralty, provided the want of jurisdiction appears on the face of their proceedings. 12 Co. 78; 2 Term Rep. 649; 3 Term Rep. 4, 5; 6 Mod. 252.

The following cases were also cited to prove a want of jurisdiction in the admiralty. 3 Blackst. Com. 106; 6 Vin. 512, 524, pl. 6; 4 Inst. 144, 2 Inst. 166, 167; 5 Co. 106, 107.

To this it was answered by the counsel for the commonwealth, that nothing but the Court proceedings can impeach the jurisdiction of the admiralty after sentence. It has been already observed that the jurisdiction is to be presumed: if doubtful, it is a sufficient answer to the objection.

The objections of the defendants to the jurisdiction are three: 1st, that the money is wreck; 2d, That the vessel was stranded; and 3d, That salvage in the present instance is not of admiralty jurisdiction. As to the first objection, we say that the word "wreck" in the proceedings, must be taken in its common and natural sense. Wreck is defined to be "the ruins of a ship which has been stranded or dashed to pieces on a shelf, rock, or lee shore by tempestuous weather." Wesket on Insurance, 606. The words "legal wreck" are used by this author. Ibid. And so frequently by Sir William Blackstone, to prevent the mistakes of students. 1 Blackst. 292, 293, &c. Now it appears here by the whole proceedings, that it could not be wreck in the legal sense, for the captain and mariners were saved. And therefore by this circumstance the legal import of the term wreck is controlled.

As to the second objection, *stranding* means running on the ground whether wet or dry: but it is stated in the libel that the stranding was on the high sea; so that in this particular also the technical meaning of the word wreck is excluded.

As to the third objection, it is well known that the powers of a Court of law are very incompetent in the cases of salvage, contribution and average. The jurisdiction of the admiralty is often by usage, as in the case of part owners not agreeing to freight a vessel, seamen's wages, &c. Molloy lib. 2, c. 6, sec. 7. Salvage is matter of admiralty jurisdiction, though the goods were attached on land. 1 Salk. 35. Goods may be wrecked at sea before they are cast on land. 5 Co. 106 b. There is a difference between wreck at sea and wreck of sea. Ib. 107 b. Now wreck and shipwreck are used in the civil law as synonymous terms. Collection of Oleron Laws, 113, 349, 350, 352. We contend, therefore, that on a fair construction of the admiralty proceedings, the word "wreck" must be taken in its common and received sense, and as distinguished from "legal wreck," as in the case in 4 Burr. 2035, where the word "covenant" in admiralty proceedings, was considered as an agreement in common parlance, and not necessarily to import a contract under hand and seal.

On the third reason, it was insisted by the defendant's counsel, that the stipulation in the admiralty was merely void, supposing that Court to have no jurisdiction of the subject matter. A new Court cannot prescribe. Such a tribunal can have no other jurisdiction than is expressed in its erection. 6 Vin. Abr. 497, sec. 3. It is not a Court of record, 1 Vent. 1; 12 Co. 104; 3 Black. Com. 109. Pleas *coram non judice* are void in themselves. 10 Co. 76 a. 1 Lil. Abr. 508; 3 Burr. 1922. Where Courts exercise a jurisdiction which they have not, it is *coram non judice*, and trespass will lie against the officer. 2 Wils. 384. Where it appears that the cause of action was out of the jurisdiction of the inferior Court, escape will not lie against the officer, for it is merely void. 1 Rol. Abr. 545, pl. 1. A record of a thing whereof the court where the record is, hath no jurisdiction of the cause, shall be no estoppel of another action. Ib. 863, D. A recognizance taken in the Court of admiralty to stand to the order of the Court is void. Noy, 24. In the present instance the stipulation purports to bind the lands and tenements of the defendants, which it clearly cannot do. Admiralty cannot take recognizance as a Court of record may do. 4 Inst. 135. 2 Comy. Dig. c. 8, tit. County, p. 584. If admiralty has jurisdiction of the original cause it may go on and determine incidents: but where it has not such jurisdiction, though there arises a question in it which is proper for the conusance of that Court, yet that takes not away the power of the common law. 12 Mod.

144. Comb. 462, S. C. Where it appears on the face of the libel that the spiritual Court can have no cognisance, or that the party cited is an inhabitant out of the diocese, then libel is *felo de se*, and prohibition will issue after sentence. Carth. 33. Officer executing process of an inferior Court is not justified, if it appears that the cause was out of its jurisdiction. 1 Salk. 201. *Ca. sa.* issued by an inferior Court *extra jurisdictionem*, escape will not lie against sheriff. Bull. 65. No consent can give jurisdiction. Prohibition may be applied for even against the party's own suit. 1. Vez. 470, 471. 2. Rol. 312.

Where the greater part of the owners of a vessel were opposed by the lesser, in the ship's going a voyage, and a stipulation was entered into by the major part of the owners to the disagreeing partners, under the decree of the admiralty, prohibition has issued. Carth. 36. 1 Show. 13, S. C. Comb. 109, S. C.

[It was admitted that this case is contradicted in 2 Ld. Raym. 1285. 6 Mod. 162. But it was said that the subsequent part of the case of Knight *vs.* Berry, that the major part of the owners were not without a remedy at law in such a case, had not been shaken by any authority.]

Bond taken by the ordinary from an administrator to compel him to make distribution of the surplus of the intestate's personal estate among the next of kin, however just and reasonable it would appear, has been held void in the Courts of law before the statutes of distribution, 22 and 23 Car. 2. 1 Lev. 233. T. Raym. 498, 499, 225, and in such cases prohibitions have issued from the temporal Courts. 1 Wms. 49. 2 Wms. 441, 442, 447, 448. Vid. 1 Vent. 166. 2 Lev. 36.

But it may be said that the stipulation in the admiralty may be void as such, yet it may operate as a private contract or obligation. We ask, Had that Court a right to demand such stipulation in the present instance? Was it not done under color of office, and by a kind of legal coercion? Would not the sanctifying of such a transaction as a contract or agreement, necessarily introduce all the inconveniences of usurped jurisdictions, of which the common laws have been so uniformly jealous?

To this it was answered, that all the authorities cited, went on the ground of the Court of Admiralty of Pennsylvania, having exceeded their jurisdiction, which cannot be conceded for the reasons above mentioned. The proceedings of the Courts of Admiralty are often governed by usage, as in the cases of seamen's wages, and part owners taking stipulations on letters of marque and reprisal. Where the custom has been established by usage, Courts of law will not interfere. 2 Lord Raym. 1286.

In such a case in France, the money would have been lodged in the admiralty. Here was a French captain, agent and owner. They pursued the laws and customs of their own country. The admiralty has jurisdiction to take recognizance or stipulations. 3 Blackst. Com. 108. 1 Ld. Raym. 223, 235. 2 Ld. Raym. 1285. 2 Stra. 890. 2 Sid. 152, 197. 6 Mad. 162. Cro. El. 685. F. N. B. 97, B. They are used in that Court as synonymous terms. 3 Blackst. 108. 2 Ld. Raym. 1285. Admiralty has power to take stipulations in other cases than to compel an appearance. 1 Wils. 103. It is not pretended that they can bind lands by their stipulations as a Court of Record. Those words in the stipulation in the present case must be rejected as surplusage. In a late case determined in England, a recognizance taken in the admiralty of Nova Scotia, "binding lands and tenements," was sued in the admiralty of England, and on motion for a prohibition, the same was denied. It was resolved, that though it could not be considered as a recognizance to bind lands, yet it operated as a stipulation by the parties to abide the decision of the Court of Appeals. Henry Blackst. 189, 164.

This case is cited by Buller, J. 3 Term Rep. 270.

The authorities produced to show that, previous to the statutes of distribution, a bond given by the administrator conditioned to make distribution of the surplus of the intestate's estate, was void, went on this ground, that the ordinary, by such an obligation, violated the clear right of the administrator to such surplus, which was vested in him by the stat. of 31 Edward 3, chap. 11. 1 Wms. 49. 2 Wms. 441, 442, 447, 448. Where the spiritual Court took a bond from an administrator *durante minori etate*, with the will annexed, for duly administering and paying debts and legacies, and on demurrer it was objected, that it was a void bond, not warranted by 21 Hen. 8, c. 5, or at common law; but the Court supported it as a bond at common law, being made for a reasonable purpose. 2 Stra. 1137. Vide T. Raym. 78. Cro. El. 544.

So here, it is insisted for the state, that if the stipulation cannot operate as such, *stricto jure*, it may as a good contract and binding agreement. Any thing will amount to a contract which expresses the meaning of the parties, though it wants form. Powell on contracts, 313. Here are all the essentials of a good contract; proper parties and subject matter, consent, right on one hand and obligation on the other. If the property had no owner, the state would be entitled to it; it is the common mode of taking recognizances and stipulations to the commonwealth. If the judge of the admiralty did not act strictly and literally as such, he is to be considered as agent for the captain; and he did

precisely what the captain *ex æquo et bono*, ought to have done for the true owner.

On the fourth reason in arrest of judgment, it was contended by the defendant's counsel, that the stipulation could not support an action of debt. It lies on simple contracts, specialities, or matters of record. 1 Espin. 182. *Indebitatus assumpsit* will lie in no case but where debt lies. 1 Salk. 23. 6. Mod. 128. Nothing but a meritorious valuable consideration can raise a debt; and it is not every contract which obliges one to pay money that raises a debt. 6 Mod. 129. 5. Mod. 13. Action lay not on a promissory note before the statute. 1 Salk. 129. Debt will not lie against the acceptor of a bill of exchange. Hard. 486. *Indebitatus assumpsit* will not lie on a promise by A to pay B 20*l.* upon his receiving 100*l.* from C. Skin. 196. Debt lies by the party to the contract, his executors or administrators. 2 Comy. Dig. 640. *Indebitatus assumpsit* will not lie against a father for money lent to his son at his request. Carth. 446. Conuses of a statute staple cannot bring debt, because no seal of the party to it, but only the king's seal. 2 Bac. 15; 2 Brook's Abr. 248.

Debt will not lie where there is no *quid pro quo*. Dyer, 272. Assumpsit but not debt, will lie for attorney's fees against A on a retainer to prosecute a suit for J. S. Cro. Car. 107, 193. Sands vs. Trevilian.

It was insisted that there was no valuable consideration between the commonwealth and the defendants, or any privity between the state and Lanoix.

To this it was answered, that the law must be construed on principle; precedents must be also attended to. (Preface to Douglass's Reports.) The state in the present instance, is trustee for Lanoix, as in England, the king, in certain instances, is royal trustee for the party. 1 Vez. 453. 4. Burr. 2118. 1 Vern. 439. Though a precedent cannot be produced of an action of debt being brought on a stipulation in the admiralty, yet it is within the reason and true spirit of the adjudged cases.

Debt lies as well without writing as with writing, but in the former cases the defendant may wage his law. Wood's Instit. 539. It will lie for any determinate sum certain. 3. Blackst. Com. 153, 134. 3 Reeve, 58, 62. 2 Comy. Dig. 637, 8. Bull. 71. 2 Bac. 13.

Debt is founded on an express contract, in which the certainty of the sum or duty appears, and in which the plaintiff recovers the sum he goes for, *in numero*. 1 Espin. 182.

Debt lies, though the contract be by way of promise executory upon a good consideration, as upon a promise to pay 100*l.*

upon the marriage of B; 1 Rol. Ab. 593, 1, 10. Ib. 594, pl. 14. So though the promise be for the advantage of a stranger; as if one promises to pay so much for the education of the child of another. All. 6. Or if he retains a tailor for 40s. to make a garment for his own daughter; 2 Rol. 77; or to pay for the embroidery of a gown for the servant of his daughter. Cro. El. 880. One promises another 20*l.* if he will marry S, a stranger; debt will lie. 7 Vin. Abr. 330, E. So on a promise to a physician or surgeon if he cures another person. Ib. 1 Rol. 593; 1, 15, 17.

So it lies if the sum be not certain, if it may be ascertained; as upon an agreement to pay the debt of A. 2 Jon. 184. Dub. Cro. El. 758. 2 Comy. Dig. 638.

As to the cases cited *pro def.* Carth. 446. Butcher *vs.* Andrews, and Dyer, 272, Pasch. 10 Eliz., the promises there were made on past considerations, for matters done to strangers, and where there was no express promise. If a consideration be executed and is entirely past, and the contract is merely subsequent, it is not a sufficient consideration to ground a contract on, unless something arises between the parties which is meritorious. 1 Powel on Contracts, 348, 350. 7 Vin. Abr. 334. F. pl. 1, 2.

There is a diversity between debt and assumpsit. In assumpsit, it is not necessary that the contract be *eodem instanti*, but it suffices if there be inducement enough to the promise, and though it is precedent, it is not material; but in debt, it is requisite that benefit come to the party; otherwise for want of *quid pro quo*, debt lies not. 7 Vin. Abr. 332 pl. 18. Cites Dyer 271, *b.* pl. 29. In the present case, the money was delivered to the defendants in consequence of the stipulation, and *eodem instanti*. The stipulation will either operate regularly as such, or as an express contract. In either sense, it is a direct acknowledgment of the debt. The suit is not brought on the stipulation alone; the information fully states the whole of the admiralty proceedings. Debt lies on the by-law of a corporation, on account of the presumed consent thereto. Informations in the name of the king are never brought in case, but uniformly in debt.

As to the case of Sands *vs.* Trevilian, Cro. Car. 107, 193, it opposes the whole string of authorities, and is denied to be law in 1 Rol. Ab. 594, pl. 14. 2 Show. 421. Perhaps the circumstance that the promise was deemed maintenance, had considerable weight in the resolution. The conuzee of a statute staple shall not have debt, because there is a remedy prescribed by the statute. 1. Rol. Ab. 599, M. pl. 2. *Quære*, Vid. Ib. pl. 2.

2 Comy. Dig. 635. Astor's Entries, 223, 327. Cro. El. 461, 494, 541, 544.

On the fifth reason, it was said by the defendant's counsel, that it should have been expressly averred that the money was the property of Lewis Lanoix. The stipulation bound the defendants to perform the trust respecting it, and was intended as an indemnity to the judge and officers of the Court of admiralty against Lanoix and all other persons. The declaration should have stated that Lanoix was the true owner, or if that was not the case, that the defendants did not remit the coin to the true owner. The true construction of the stipulation is, that defendants were to be accountable to Lanoix, if the right owner; but if he was not, then to the right owner. They cited 5 Comy. Dig. 41. Fitzgib, 61, 63. Where the promise is in the disjunctive, the declaration should state that the defendant did not perform either the one, or the other act.

To which it was answered, that it was sufficiently laid that the money was the property of Lanoix. Under this supposition defendants received the money from the admiralty; and if it was afterwards discovered that it did not belong to him, they should have paid it over to the person truly entitled, upon proper proof. If Lanoix was not the owner, the commonwealth might recover it for the true owner.

On the sixth reason, it was insisted that if the admiralty had original jurisdiction, it belonged to them exclusively to determine the present controversy. Their jurisdiction would extend to incidental matters. 6 Vin. 516. pl. 5.

The maxims are *principale trahit ad se accessorium; accessorium sequitur naturam principalis*. It is contended for the state, that the admiralty claimed jurisdiction *causa salvagii*; they must then admit that it draws to it stipulations, as necessary incidents. Recognizances in chancery must be sued in chancery, and so we conclude stipulations in the admiralty must be sued there also, unless cases can be shown to the contrary. That stipulations are usually sued in the admiralty, see 2 Lord Raym. 1286. Carth 27. They may be compared to the case of bail bonds, which must be sued in the Court where they were taken, because there may exist a variety of circumstances, which the proper Court is only competent to inquire into. 3 Burr. 1923. *Scire facias* upon a recognizance of debt in chancery; defendant pleaded a release, which plaintiff denied, and therefore all the record, issue and process, was sent to B. R. to be tried. The plaintiff was nonsuited, but afterwards brought another *scire facias* in B.

R. and well, for there is the record : *aliter* if the tenor of the record only had been sent.

It was answered that the Courts of common law and admiralty had in many instances, concurrent jurisdiction, as in the case of seamen's wages, &c. The suit was not brought in the admiralty here, merely because under the terms of the stipulation, the judge and officers of that Court were to be indemnified against the true owners of the money ; and it has been determined that a judge cannot sit where he is concerned in the suit. Hard. 503.

Per Justice Shippen. It has been said at the bar, that such clauses in stipulations are unusual ; but I have known many stipulations taken in this manner, because the judges of the admiralty have in many cases been deemed responsible. It is not unusual.

Bond in the admiralty to perform its own decree must be sued in common law Court. 1 Keb. 88.

A judgment obtained in London, in a cause which by the custom of the city could not be brought in the Courts of Westminster, debt will lie on it in B. R. or C. B. 1 Rol. Ab. 600, pl. 8. A recognizance in chancery may be sued in B. R. though the regular remedy is by *scire facias* in chancery. Cro. El. 608. Debt lies in C. B. on a judgment on a *scire facias* on a recognizance in B. R. 2 Com. Dig. 634. Cites Dy. 306a. in marg. Debt lies in B. R. on a recognizance of bail in C. B. So of bail in B. R., it may be sued in C. B. 2 Com. Dig. 635. So of a judgment in the Marshalsea. Dyer, 306.

The reasoning and cases cited on both sides under the second point, apply equally to the seventh reason in arrest of judgment.

Finally it was insisted by the defendants, that the verdict was contrary to evidence. The jury gave interest for six years and eleven months from the date of the stipulation until the day of giving in their verdict. To say the least of it, the verdict savors of the most extreme rigor. The condition of the stipulation was to remit the money to Lanoix, or the true owners. Now it appeared on the trial, that Lanoix, in the month of April, 1784, suspended the payment of the money by his own act, and that no new demand was made until the writ was sued out against the defendants. Upon every legal and equitable principle, there ought to have been an abatement *pro tanto*, as the engagement of the defendants to do a specific act had been dispensed with, at least for a time, by the party himself. Brown's Rep. 239.

To this it was answered, that the matter of damages was the peculiar province of the jury; that there could be no reason offered why Le Caze and Mallet, or their security, should not pay interest while they had the use and benefit of so large a sum of money in their hands; that the jury went upon the large principle on which fair engagements are founded, viz.: *fides est servanda*, and that here there had been unreasonable delay and vexation. 3 Burr. 1663 to 1670. If, however, it should appear to the Court that the jury had mistaken the damages, by giving interest for too long a period, they would, on the commonwealth's offering to remit it and correct the mistake, accept the offer, and not grant a new trial, under the authority of 2 Term Rep. 214.

The Court took time to advise hereupon, and now the Chief Justice, after fully stating the case, gave the opinion of the Court, Mr. Justice Bradford declining to take any part in the decision, having argued the matter as attorney general *pro republica*.

The defendants have moved that the judgment on the verdict should be stayed on seven grounds, and have assigned one reason for a new trial.

A motion for a new trial should not be made after a motion in arrest of judgment, unless in cases where the party had no knowledge of the fact at the time of moving in arrest of judgment; for by moving in arrest of judgment you tacitly admit the verdict to be good. 2 Salk. 647. Bull. 326. 1 Burr. 334. This is settled by the 32d printed rule of this Court, by which it is ordered that no motion for a new trial shall be made after a motion in arrest of judgment. The present case, therefore, must not be drawn into precedent.

We shall therefore, in the first place, consider the reason offered for a new trial.

It has been said the verdict was against evidence, because the jury allowed interest on the sum demanded, 2663*l.* 5*s.* 2*d.*, for two years, nine months, and nineteen days more than they ought to have allowed, to-wit: from the 4th November, 1783, the date of the writing on which the action is brought, until the 23d August, 1786, when the writ was served; alleging that Lewis Lanoix, for whose use the information is exhibited, had, by his own orders, suspended the remittance of the money to him, during that period. This allegation is made on the deposition of John Sablonier, who swore that Mr. James Le Caze arrived at Bordeaux in March, 1784, and, in a conversation with Lewis Lanoix on the 9th April following, he, Mr. Lanoix, agreed to keep the bills of exchange drawn by Le Caze and Mallet upon Le

Caze and Sons for the sum due, and desired James Le Caze to write to his partner, Mr. Mallet, in Philadelphia, not to remit the silver, which was done; and it did not appear in evidence that any further demand of it was made until the 23d August, 1786, the day on which the writ in this cause was served.

Upon this evidence, the jury may have concluded, that Mr. Lanoix only *excused* the remittance of the silver during this time, merely as an indulgence to Le Caze and Mallet, and from an expectation that Le Caze and Sons would honor the bills; but being disappointed in this, he ought to have interest for the money, as if no such indulgence had been granted; that the forbearance was at the instance of James Le Caze, and merely to oblige him, and that Lanoix should not be a loser by it. The jury, perhaps, should not have allowed interest for the time it would have reasonably taken to have remitted the silver from Philadelphia to Bordeaux for Mr. Lanoix. Be this as it may, it was a fact properly within the province of the jury; it was their duty to consider and determine it; and in such case, though the legal interest is usually the measure of damages for delaying payment of money, yet if something more is given, unless it be unreasonable and excessive, the Court cannot interfere.

We are therefore of opinion that a new trial ought not to be granted.

With respect to the reasons in arrest of judgment, they may be comprised under three heads:

1st. That it does not appear on the record, that the original cause concerning the five casks of silver, was within the jurisdiction of the Court of admiralty.

2d. That if it was not, Anthony Forenay, master of the brigantine Count Durant, had no right by the common law to take such a writing as the one now sued, from the defendants.

3d. That if such a writing could be taken by the common law, yet an action of debt upon it could not be maintained.

As to the first, it is recited in the information by the attorney general, that the libel in the Court of admiralty was concerning five barrels of silver, saved from the "wreck" of the brigantine Count Durant, and put into the custody of the marshal, and nothing more, except that "salvage" was decreed to captain Forenay for saving it.

Shipwreck is a matter of revenue. In a "legal wreck," the goods must come on shore. *Jetsom*, *flotsam*, and *ligan* are not matters of revenue, and are cognizable in the admiralty; but wreck is determinable by the common law. 1 Blackst. Com. 290. 3 Blackst. Com. 160. 5 Co. 106, 107. 6 Vin. 512. pl. 5.

It is not alleged that the silver was *jetsom*, *flotsam*, or *ligan*, or that the cause arose within the admiralty or maritime juris-

diction, or upon the high seas; but if we travel out of the record, the contrary appeared from the evidence, that the master (Forenay) had signed a bill of lading for it, and that it was never out of his custody. He carried it on shore at Lewistown, in the Delaware state, and from thence to Philadelphia by land (1 Vent., 308; Carth., 423; Dall., 50). All the proceedings of a Court having no jurisdiction, are void (1 Salk., 201); from which it rather seems that the Court of Admiralty had no jurisdiction of the original cause, from any allegation, averment, or any other matter appearing in the information, and that this matter would not warrant a suit in that Court. But as to this point, it is not necessary to give a positive opinion.

The second point is, whether Forenay could take this writing, by the common law, from the defendants. Although a Court of Admiralty cannot take a recognizance, which is a bond or obligation of record, from the defendants, not being a Court of record, nor the judge a judge of record (6 Vin. Abr., 500, pl. 1), yet it can take a caution or stipulation, which is usually for appearance or to perform a decree, &c., and is in nature of a recognizance. It appears that the proceedings in the admiralty were without the participation or knowledge of Lewis Lanoix, and that no coercion was used by the Court. All was voluntary, and not only by *consent*, but on the *application*, of the defendants.

There is no positive law declaring such a writing void. It was not given for anything against good morals, or illegal, but for a meritorious valuable consideration, viz.: a sum of money delivered in specie, and for an honest purpose. If the taking of this writing *in the Court* cannot give it any additional sanction, so, on the other hand, it cannot destroy or prejudice its legal operation. Though void as a stipulation, it is good as a contract, as it was determined in the case of *Ascue vs. Hollingsworth*, Cro. El., 544; that an instrument which was void as a statute staple, was yet good as an obligation, and the case in 2 Stra., 1137, favors this opinion. See also Henry Blackstone's Reports in C. B., 164, 189; 3 Term Rep., 270.

For these reasons, we think this transaction may be considered as done out of Court, and that it is good and binding on the parties, by the common law.

The next and principal question is, whether the present information in debt upon this writing is maintainable. It has not been doubted but that special assumpsit would lie in this case, but it has been denied that an action of debt would lie.

A *debt* is a sum of money due by *express* agreement, either in writing or by parol, where the quantity is *fixed*, and does not

depend on future calculation; the non-payment or non-performance is an injury for which an action of debt may be brought (3 Blackst. Com., 158; F. N. B., 145; 1 Lil. Abr., 554, C.; 2 Bac. Abr. 13). And it is held in 6 Mod., 129, that a meritorious valuable consideration will raise a debt. If A gives money to B to buy wares, or any other thing, for him, and B does not buy them, debt will lie for the money (7 Vin. Debt. K. pl., 26; Cro. El., 644). For, by the delivery of the money, as it could not be known again, the property is altered, and a duty arises. Where one delivers money to B to be repaid at such a day, debt lies (1 Rol. Abr., 597, l. 50); or to be safely kept (Ib. l. 51). Debt lies on any covenant where the sum is reducible to a certainty. Per Windham, J., cites F. N. B., which the Court agreed. 2 Keb., 225, pl. 80.

Debts for which an action of debt may be brought at common law, may be classed under four general heads: 1st. Judgments obtained in a Court of record on a suit. 2d. Specialties acknowledged to be entered of record, as a recognizance, statutes-merchant, or staple, or such like. 3d. Specialties indented or not indented. 4th. Contracts without specialties, either express or implied.

The present action comes under the last head, and is founded on an *express contract* in writing, whereby, in consideration of five barrels of silver coin, delivered by Anthony Forenay, by the advice of the Court of Admiralty, to the defendants, they promise and engage to remit them to Lewis Lanoix, at Bordeaux, or to pay to the commonwealth 4,000*l.* sterling for his use. The writing is in the form of a recognizance taken as a stipulation in the admiralty, but deriving no advantage or prejudice therefrom. It is a legal, fair, and honest contract, grounded upon a meritorious and valuable consideration; and although Mr. John Ross is only a surety, yet, unless he had entered into the writing, the contract might not have been made. He has become a party in it, and is responsible for the performance equally with the other defendants. The sum demanded is fixed and certain; there was a duty certain, which has not been performed, for which an action of debt lies; and although perhaps an action of special assumpsit might be preferred, yet we conceive debt is maintainable. The commonwealth must be considered as a trustee for Lewis Lanoix, under the authorities of 1 Vern., 439; 1 Vez., 453; 4 Burr., 2118. The verdict has been taken in the manner long practised in Pennsylvania, though peculiar to it, and in consequence of an act of assembly.

Upon the whole, the Court unanimously agree that the judgment be entered for the commonwealth.

A writ of error was brought hereupon in the High Court of Errors and Appeals, and afterwards, in July term, 1793, the judgment was affirmed on argument.

RESPUBLICA *vs.* JOHN HANNUM, Esq.

Information will not be granted against a justice of peace for extortion and oppression, where he has taken the usual fees, though illegal, and there has been no criminal intention.

A RULE had been made at last term, on the defendant, a justice of the peace of Chester county, to show cause why an information should not be granted against him for extortion and oppression.

This rule was granted on the affidavit of Hazael Thomas, who deposed that on a prosecution against him and sixteen others, for a riot and assault and battery, the defendant had received from him, for justice's fees alone, 25*l.* 3*s.* 6*d.*, according to a bill produced and filed by him.

The bill was as follows:—

Republica	}				
vs.					
Thomas and sixteen others.	}				
		£	s.	d.	
17 Warrants.....		1	6	6	
18 Recognizances		1	7	0	
13 Affidavits.....		3	0	0	
14 Recognizances of witnesses.....		1	1	0	
Taking and entering 13 examinations.....		0	19	6	
			7	14	0
Respub. vs. same — same fees on assault and battery...		7	14	0	
Respub. vs. same — same fees.....		7	14	0	
Respub. vs. Custard.....		2	8	7	
		£25	10	7	

The fact was, that a writ of estrepement had issued from this Court, in an ejectment commenced by the lessee of the said Hazael Thomas and others, against James Cummins, for certain lands in Chester county. The sheriff deputed a person to serve the same, who, with his party, was guilty of great outrage and irregularity in the execution thereof. Warrants issued against them and cross warrants against their opponents. In the event, bills of indictment were found against fourteen of Thomas's partisans, who were at length acquitted by the traverse jury.

Mr. Hannum now appeared, and purged himself on his affirmation, of any intention of oppression. He declared that when

James Cummins applied to him for warrants against seventeen different persons for the riot, he used his endeavors to accommodate the dispute, and told the applicant that it would be attended with heavy expenses. Upon the application of the opposite party for warrants, he pursued the same line of conduct. Both sides, however, were too eager for the different prosecutions to be put off in this manner; and at last he found himself constrained to bind them all over to the sessions. He continued acting in this matter as a justice for above the space of three weeks. When the actions were settled, Thomas called on him for his bill of costs. He made him the bill produced, but at the same time told him, if he was dissatisfied therewith, the bill should be taxed by the justices. Thomas replied, the bill was much more reasonable than he expected, and expressed his full satisfaction therewith. The defendant further declared, that if he had erred in his conduct, his error was unintentional; that he had pursued the usual practise of the justices of peace in Chester county, and produced certificates of five of the justices thereof; that on a meeting had of the members of the Court, some years after the revolution, to regulate their fees, they had agreed to charge 2s. 6d. for each name included in a state warrant, and that this was the general usage of justices of the peace in that county.

Mr. Hannum's affidavit was confirmed and corroborated in several particulars by other depositions, which were produced to the Court.

Messrs. Wilcocks, Tilghman, and Porter, for the defendant, now showed cause why an information should not be granted. They said, it clearly appeared there was no intention of oppression, nor, in fact, had Thomas, with all his zeal and heat, sworn that he believed there was such intention. Mr. Hannum had endeavored to reconcile the disputants, but could not; he had proceeded reluctantly in the business. He has proved, by the certificates of other justices of reputation, that the charges he made for his fees were according to the usual practise of the county; that they had agreed them to be the proper and legal charges in a large and general meeting, taking into consideration the *quantum meruit* for services not enumerated in the act of assembly; and the prosecutor showed his satisfaction with the bill produced, declined having the same taxed by the Court, and actually paid it under the sense of its being a reasonable bill. It further appeared, from the evidence, that he had reduced the constable's bill from 15*l.* to 5*l.* 18*s.* 6*d.*, and another bill from 11*l.* to 5*l.* 18*s.* This showed clearly that there was no

malicious or oppressive intention. There might be an error of the head, but not of the heart.

They insisted that an information would not lie against a justice of peace, unless there was corruption, oppression, or bad motives in him. If his judgment be wrong, but no malicious or oppressive intent, information would not lie, 1 Burr. 557, nor for mere error of judgment. 2 Burr. 787, 1162. Though the behavior of a justice be not justifiable in all its parts, information will not lie. 2 Burr. 719.

E contra, Messrs. Sergeant, J. B. M'Kean, and T. Ross contended that the Court would grant an information on reasonable grounds, 2 Haw. 262, sec. 8. An information will lie against a justice when he acts *mala fide*. 3 Burr. 1716. No custom, agreement, or combination of justices of the peace can alter the laws as to their own fees. Since the revolution, the mode of taxing fees by almost all officers has become very exceptionable. Too many, who dishonor the commission of the peace by their conduct, give just cause to suspect that, in their idea, *stat pro ratione voluntas*. The legislature have ascertained what fees a justice of peace is entitled to, by an act of assembly passed 22d August, 1752 (old edition of Laws, p. 242). If these are not adequate to their services, the legislature only are competent to effect an increase. No further or other fees can now be legally taken. It is obvious to the first view, that a bill of 25*l.* 3*s.* 6*d.* for justice's fees on one prosecution, by splitting and dividing supposed offenses, is extravagantly enormous. The apothegm of Lord Bacon, that a sheep could not fly to a bush for shade or protection, but he must lose part of his wool, is verified here beyond the strongest imagination of his lordship! For Thomas has been most hideously shorn! The bill produced *ex natura rei*, must have originated from oppressive motives. The practise of a justice of peace in charging 2*s.* 6*d.* or 1*s.* 6*d.* for each person contained in a warrant for riot or assault and battery, is not grounded in law or reasonable in itself. In point of trouble, there is only an additional name in the warrant. One oath or complaint is sufficient to ground it upon. No prothonotary charges more for any process, when there are a dozen named in it, than when there is but a single person; and no sheriff ever charges more than [single mileage, on serving either original or judicial process against several defendants in the same writ.

Per Curiam. The charges against Mr. Hannum are extortion and oppression. Probable cause was shown why the rule should be taken.

The defendant has now shown cause, that he has not taken more fees than were usual in Chester county. This is proved by the certificates of five gentlemen in the commission. But the rule of charging fees by the justices of Chester county is certainly illegal. It is a greater gratuity than any officers usually receive for their services. By an act of assembly passed 27th November, 1779, the right of an officer to take fees as regulated by law or *practise* was recognized; but it could not have extended to an usage like the present. The justices had no right or power to fix their own fees. The defendant's conduct therefore, was *not justifiable*, but is against law.

The next question is, whether it is *excusable*. It does not appear to us that there was a disposition in the defendant to oppress. He endeavored to accommodate the disputes; he declined issuing his warrants. A justice of the peace is not bound to issue his warrant whenever it is applied for. He must use a legal discretion, and determine, on a mature consideration of all the circumstances, whether a warrant should issue. There appear no criminal intentions, passionate expressions, threats, or partiality. It is proved that the prosecutor, believing the bill to be reasonable, actually paid it willingly. We are therefore unanimously of opinion, that there are no proper grounds for a prosecution by way of information.

At the same time we publicly express our opinion, that the fees are illegal; and we hope after this discussion, that such *practise* will be discontinued. After a recognizance was taken to answer for the riot, warrants should not have issued for the assaults and batteries, which were the overt acts of the former offense. The whole was perpetrated at one time, and must be considered as one offense. We are also of opinion, and recommend it to Mr. Hannum, that his bill should be properly taxed, and that he should return to Thomas the moneys not due under such taxation, and discharge him, paying costs.

The defendant requested hereupon that the fees might be taxed by the justices of the Supreme Court, at the ensuing Court of *Nisi Prius* to be held for Chester county, which was accordingly done by M'Kean, Chief Justice, and Yeates; and upon a full examination of all the papers and witnesses, Mr. Hannum's bill was reduced to 6*l.* 6*s.* 6*d.*

GRACE. SCOTT *vs.* EZRA CROASDALE.

Dower of the wife is barred by the sheriff's selling the lands under a *levari facias* on a mortgage executed by the husband alone after marriage.

ACTION of dower in 113 acres of land in Southampton township, in Bucks county.

This cause came before the Court on a case stated ; and the question on the facts shortly was, whether a man seized of lands, afterwards marrying, and then mortgaging the premises, without his wife joining in the mortgage deed, and the premises being sold by the sheriff under a *levari facias* issued in due form of law, against the executors of the husband, his widow could maintain dower thereof against the vendee.

Mr. Sergeant, for the demandant, contended that dower was favored in law, and that the law here was as in England, that unless the feme joined in the deed with her baron, and was separately examined, she could not be precluded from her dower.

Mr. Wilcocks, for the defendant, insisted that under the act of assembly of 4th Annæ, passed in 1705 (old edition of Laws, p. 27, sec. 10), the legislature had directed that the widow should hold her dower or thirds during life, of such lands as should yield yearly rents and profits ; and the said profitable lands and tenements, and the unimproved or rough land next adjacent thereto, should not be sold but for payment of intestate's debts. This evidently showed that the dower of the wife must be subjected to the payment of debts ; and in a late case of *Howel vs. Leacock*, where lands had been sold by executors for payment of debts, the widow's dower was held to be barred ; and in all cases of sales under the intestate acts, the widow is only entitled to one-third of the clear residue.

Mr. Wilcocks was stopped by the Court. They said the point was too clear to bear an argument. Lands in Pennsylvania, by the policy of the legislature, were made assets for the payment of debts ; and the present case cannot be distinguished from a sale under a common judgment, *feri facias*, and *venditioni exponas*. The chief justice said, he perfectly recollected a similar determination in this Court, about thirty years ago, when the opinions of several eminent counsel were read upon the argument, concurring with the resolution of the Court.

Judgment for the tenant.

WILLIAM BROWN, executor of WESTON CLARK, *vs.* SAMUEL YOUNG.

Scire facias on report of referees, finding that the defendant should make a certain deed or pay a sum of money, need not state that the deed has not been made, after the defendant has made exception to the report, and judgment has been rendered thereon.

Scire facias sur report of auditors.

Plea, *nul tiel* record.

The plaintiff showed to the Court a record of the Court of Common Pleas, whereby it appeared that the matters in dispute had been submitted by the testator and defendant to reference; and that the referees had awarded, that the defendant should make a deed to the testator for five thousand acres of land in Harrison county in Virginia, or pay to the testator 104*l.* 3*s.* 6*d.* This report was filed 15th October, 1787, and judgment *nisi* entered thereon. The defendant's counsel filed his exceptions to the report, and afterwards, in December term, 1788, the Common Pleas overruled the exceptions, and gave final judgment for the plaintiff. A *scire facias* was then brought in the same Court by the plaintiff as executor, stating the non-payment of the money in the report, but silent as to the deed.

Messrs. Wilcocks and S. Levy for the defendant, contended that the *scire facias* was defective, inasmuch as it did not recite the judgment on the report truly as entered 15th October, 1787; and as he thereby had the alternative of giving the deed or paying the money, it was a material variance. If a judgment is on several promises and entire damages, and the *scire facias* recites *cujusdam promissionis*, it is a variance, and cannot be amended. 2 Stra. 892. Variance of a *scire facias* from a judgment held ill. 5 Com. Dig. 394; System of Pleading, 368.

To this it was answered by Mr. Sergeant for the plaintiff, that the election of the defendant was destroyed at the time of the final judgment; and such was the case in *Thompson vs. Musser*, Dallas, 460, 462.

Per Curiam. The plaintiff is entitled to judgment. The defendant has waved his election by filing his exceptions to the report. If he had thought proper he might in due time have tendered the deed as an escrow; but he was precluded at the time of the final judgment, and the Court could not then by their act, after the day was passed, have granted him further time to tender the deed.

FRANCIS WADE *vs.* JAMES GALLAGHER.

Referees not to be examined as to what proof was made to them of a tender of continental money, how or when it was made, or in what kind of money. They may be examined as to a simple point, but to go further would supersede the use of references.

THE Court refused, on long argument, after a report of referees in favor of the defendant, to permit the plaintiff's counsel to examine the referees as to what evidence was laid before them to prove a tender of continental money in discharge of a debt, how or when it was made, and in what kind of money.

The plaintiff's counsel relied much on *Williams vs. Craig, Dall., 313*. But the Court observed that it was absolutely impossible to lay down any general rule which did not imply a number of exceptions. Every case must be governed by its own peculiar circumstances. You may examine referees as to a plain, simple point, as, did they allow interest on an unsettled account, or the like; but to go further would supersede the use of all references.

Judgment *pro def.*

Messrs. Tilghman and S. Levy, *pro quer.*

Messrs. Ingersol and Thomas, *pro def.*

MELCHIOR WEIDIMOR *vs.* JOHN DRISSSEL.

JACOB STOVER *vs.* same.

ANTHONY LEAR *vs.* same.

Justices of the peace have jurisdiction, when damages occasioned by the biting of a dog have been ascertained by reference.

CERTIORARI to John Barclay, Esq., of Bucks county. The facts were admitted to be these in all the causes: Defendant kept a dog which used to bite sheep; and actually killed sheep of each of the plaintiffs. On complaint, justice Barclay issued his summons, but being informed that he had no jurisdiction, discontinued the suits, and recommended a reference to arbitrators. This was agreed to, and the arbitrators awarded to each of the plaintiffs certain sums of money. The defendant refusing to comply with the awards, the justice sued him, and gave judgments for the plaintiffs.

Per Curiam. The justice had jurisdiction when the damages were ascertained by reference. Previous thereto he had not jurisdiction, the word "demands" having always been restrained to such as arose *ex contractu* and not *ex delicto*. So, if one in-

debted for rent gives a note for the amount, it may be well sued before a justice. Let the judgment be confirmed.

Mr. Wilcocks, *pro quer.*

Messrs. Sergeant and Rawle, *pro def.*

JANE KINSEY *vs.* PHILIP KINSEY.

SARAH THOMPSON *vs.* JAMES THOMPSON.

Divorce from bed and board may be granted in the first instance where it appears, on the proofs, that the person of the wife cannot be safe, though the husband offers to receive her.

LIBELS for divorces from bed and board, *causa sævitice*. Upon the proofs exhibited to the Court, in both suits, it was ruled by the Court, on argument, that where a husband shall maliciously either abandon his family, or turn his wife out of doors, or by cruel and barbarous treatment endanger her life, or offer such indignities to her person as to render her condition intolerable, or life burthensome, and thereby force her to withdraw from his house and family — though the act “concerning divorces and alimony,” sect. 10, p. 668, empowers the justices of the Supreme Court to grant the wife in the first instance a divorce from bed and board, until a reconciliation shall take place, or the husband shall, by his petition, offers to receive and cohabit with her again, and to use her as a good husband ought to do; yet, when it appears, from the proofs exhibited, that the husband’s conduct has been of such a nature that the person of the wife cannot be in safety, the Court will grant an absolute divorce from bed and board, notwithstanding any offer on the part of the husband to receive her again, with promises of better behavior towards her.

A contrary construction would make the law evidently absurd, and be cruel in the highest degree to unfortunate married women. The act is not absolutely compulsory on the Court, but it rests in their discretion, under all the circumstances of each case, whether they will permit the husband to receive his wife again, contrary to her consent. Vide 3 Atky., 295.

Messrs. Wilcocks, Sergeant, and M’Kean, *pro libellantis*.

Messrs. Ingersol and Tilghman, *pro respondents*.

PATRICK M'SHERRY vs. WM. ASKEW and WM. COCHRAN.

Bond conditioned that defendant should, by a certain day, convey lands to plaintiff by such deeds as counsel shall advise; defendant pleads performance, with leave to give the special matters in evidence; plaintiff replies, that defendant did not convey on or before the day; rejoinder, that the plaintiff's counsel did not, on or before the day, advise any conveyance; adjudged that the defendant was bound to do the first act, and that his rejoinder was a departure in pleading.

DEBT 3000*l.* *sur* obligation, dated 12th February, 1784. On Oyer, the condition appeared to be, that the defendants should, on or before the 20th day of April then next, by a lawful deed of conveyance, such as counsel should *advise*, convey to the plaintiff certain mills and lands in Hamilton's-Bann township, in the county of York, with a general warranty, and a special covenant against all incumbrances whatsoever.

Defendants plead performance of covenants, with leave to give special matters in evidence.

Plaintiff replies, and assigns for breach, that the defendants did not convey, on or before the 20th of April aforesaid, by a lawful deed of conveyance advise by counsel, the said tenements with the appurtenances, to the said Patrick, with general warranty, and the special covenant aforesaid.

Defendants rejoin, that the counsel of the plaintiff did not, at any time, on or before the said 20th day of April, advise any lawful deed of conveyance, by which they might convey the tenements in the condition of the said writing obligatory mentioned, with the appurtenances free and clear of all incumbrances, to the said Patrick, in which conveyance was to be contained a general warranty and special covenant against all incumbrances whatsoever, and of this they put themselves on the country.

Plaintiff demurs generally to the rejoinder, and the defendants join in demurrer.

The case was argued this term by Messrs. Sergeant and Bowie, for the plaintiff; and by Mr. Randolph, for the defendants.

On the part of the plaintiff it was insisted, that the construction of deeds ought to be according to the intention of the parties. 2 Blackst., 379. Where a defendant has election by a condition to do one of two things, and he cannot by the default of a stranger, himself, or obligee, or the act of God, do one, he ought to do the other. Defeazance to make such assurance as the counsel of the conuzee shall devise before a certain day, or to pay so much money before another day, it is no plea that the counsel did not devise any assurance. So, one bound to make

such a release as Dr. Lewin should think sufficient, it is no plea that Dr. Lewin did not devise any release. So, one bound to make assurance at the costs of the plaintiff, it is no plea that the plaintiff did not tender the costs. Moor., 645.

Where a covenant was, that he should convey before such a feast at the costs of the covenantee, the covenantor ought to do the first act, *scil.* notify to the covantee, what manner of estate he would have, that covantee might know what sum of money to tender. 5 Co. 22, *b*.

Where the act by the condition of a bond to be performed to the obligee, is of its nature a transitory act (as payment of money, delivery of charters, &c.), and no time is limited, though a place is expressed, there the act ought to be done in convenient time. 6 Co. 30, *b*. But when the obligee himself is party, and the act cannot be done without his concurrence, then it is reasonable that the obligor should have time during his life, unless the obligee hasten it by request. 6 Co. 31, *a*. A covenant in the disjunctive, being for the safety of the covenantor, it belongs to him to do the first act. 2 Lord Raym., 279. Debt on bond conditioned to execute a release to the plaintiff, defendant demurs, because the plaintiff did not allege, in his declaration, a tender of a release; *per curiam*, he is bound to do it without a tender. 1 Mod., 104.

If one is bound in an obligation with condition to enfeof a stranger before a day, and the obligor doth offer to enfeof him and he refuses, the obligation is forfeit. *Aliter*, if it were to enfeof the obligee; for there tender and refusal shall save the bond, and the obligee shall not give himself cause of action. Co. Litt. 209, *a*. Obligation conditioned to make such a release as one S. should advise. Plea that S. did not advise any release; adjudged ill, because not alleged, that he drew a release and tendered to the judge to be allowed; for he should draw such a release as the judge should allow. Cro. El., 716.

If obligation be conditioned to make such a lease as counsel shall advise, and the obligee appoints him to make a lease to J. S., he ought to do it, though no counsel advise it; for it means only that the lease shall be as good as counsel may advise. 1 Rol. Abr., 424, pl. 8.

It was further said, that the defendants in the present suit were bound to do all in their power to save their penalty. The title papers must be presumed to be in their custody, and the proper recitals could not be made in the deed of conveyance to be advised by counsel, unless by having recourse to them.

It was also insisted, on the part of the plaintiff, that the defend-

ants' rejoinder did not fortify their plea of covenants performed, but was variant from it, and was intended to operate as an excuse, and was therefore a departure; for it is one thing to do a matter, and another to offer to do it. Co. Lit. 304 a. 4 Bac. Abr. 123.

In covenant for further assurance, defendant *protestando* saith, that the plaintiff's counsel did not advise, &c., and for plea saith that he was not required. Plaintiff replies that J. S. his counsel advised a release, and he required defendant to seal it, which he refused. Defendant rejoins that he did not refuse, this is a departure. 4 Bac. Abr. 124. Cites Dyer, 31 b. Doct. pl. 120.

Debt on bond for performance of an award, which was to pay plaintiff 10%. and to do divers other things. Defendant pleaded performance and showed how. Plaintiff replied, and assigned breach in non-payment of the 10%. Defendant rejoined that he tendered it to plaintiff and he refused it. It is a departure. per Dyer. 7 Vin. 545. pl. 45. Cites 4 Leo. 79. pl. 167.

So where the rejoinder was, that he was ready to pay it and seal a release, held a departure. 1 Sid. 10. pl. 6.

Debt on bond for non-performance of an award. Defendant pleaded that the award was, that he should release all suits to the plaintiff, which he had done. Plaintiff replies, it was true such an award was made, but they also awarded that the defendant should pay the plaintiff 15%. at such a time and place, *absque hoc*, that they made such an award only as the defendant had alleged. Defendant rejoins, that it was further awarded that the plaintiff should release to the defendant all actions, which he had not done. Upon demurrer the rejoinder of the defendant was held to be a plain departure; for he might and ought to have shown all this at first. 5 Vin. 547. pl. 51. Cites 2 Bulst. 38, 39.

In covenant, lessee pleaded performance generally. Plaintiff replied and assigned breach in non-payment of rent. Defendant rejoined that the defendant ousted him and held him out, &c. Held a departure, because not in affirmance of the plea. 5 Vin. 548. pl. 56. Cites Sid. 77. pl. 10. Raym. 22. S. C.

In debt on bond to perform an award, defendant pleaded *nullum fecerunt arbitrium*. Plaintiff replied and showed an award. Defendant rejoined, there were other things submitted, and so no award, held a departure. 5 Vin. 548. pl. 58. Cites Sid. 180. pl. 16. Raym. 94. Keb. 678. pl. 72. Lev. 127.

Covenant to pay. Defendant pleaded performance. Plaintiff replies he did not pay. Defendant rejoins that he tendered. Held a departure. 5 Vin. 549. pl. 63. 2 Barnard. Rep. B. R. 193. Freem. 157. pl. 174.

Debt on bond to save a parish harmless, from the charge of a

bastard child. Plea *non damnificatus*. Replication that the parish had laid out 3s. for keeping the child. Defendant rejoins that he tendered the money, and plaintiff paid it *de injuria sua propria*. Demurrer, and rejoinder hold a departure. The plea should have been *non fuit damnificatus* until such a time, and then you offered to take care of the child, and tendered, &c. 5 Vin. 549. pl. 60. Mod. 43, 44. 2 Saund. 83. Sid. 444. pl. 1. 2 Keb. 612, 619.

Debt on recognizance of bail. Defendant pleaded there was no *ca. sa.* sued out and returned before exhibiting the bill. Plaintiff replies that a *ca. ca.* was sued out, &c. Defendant rejoined that defendant in the first action brought a writ of error before the *ca. sa.* prosecuted, returned and filed. Held a departure. 5 Vin. 552. pl. 77. 6 Mod. 139. 2 Lord Raym. 1256.

Debt on bond conditioned that J. L. should be a true prisoner, without making escape. Defendant pleads that he did remain a true prisoner, &c. Plaintiff assigns breach, that 13th January J. L. made an escape. Defendant rejoins that J. L. went a little way out of the rules of the prison, but being sent for by plaintiff, immediately returned, &c. Demurrer, and held a departure; for if this would excuse the escape, it should have been pleaded at first. 5 Vin. 552, cites Comy. 553, 554, pl. 230.

Debt on bond, conditioned that he should execute such an office without plaintiff's assistance. Defendant pleads that he did execute it without his assistance. Plaintiff replied that he did not execute it without his assistance. Defendant rejoins, if the plaintiff did give him his assistance it was voluntary. Demurrer, and held a departure. 5 Vin. 553, pl. 79; Barnard B. R. 4. 2 Ld. Raym. 1499.

They also cited 4 Instructor Clerical, 3, 4. References to bars concerning covenants to make assurance of lands, &c. and concluded upon the whole, that the defendant's rejoinder was departure in pleading.

On the part of the defendants it was contended, on the merits of the case, that conditions, generally speaking, are to be expounded liberally in favor of the obligors. 1 Wils. 61. That by the words, "lawful deed of conveyance such as counsel should advise," it must be intended that the conveyance should be previously advised by the plaintiff's counsel; that to suppose it otherwise would be a perfect solecism, by making the defendant's counsel the judges of what species of conveyance the plaintiff should be obliged to receive; that the word "advise" means to give an opinion on the particular species of deed to be executed. The word "devise" means to frame or pre-

pare the deed. But whether it be "advise" or "devise," the act to be done by the plaintiff's counsel was to precede the execution of the deed, and consequently the defendants were excused from making the conveyance until such act done.

As to the supposed departure in pleading, it was said, whatever strictness might be proper in England in such cases, it was rendered unnecessary here, by the liberality of practise which had obtained in Pennsylvania. Under the plea of performance of covenants, with leave to give the special matters in evidence, every matter of excuse might be offered to the jury on the trial, and therefore the defendants' rejoinder was in perfect unison with their plea and the rules of the Court. They cited Vent., 121; 2 Lev., 5. Debt against a clerk on an obligation, conditioned to perform covenants, one of which was to account for all money he should receive; defendant pleads performance; plaintiff replies that such a day such a sum came to his hands, which he had not accounted for; defendant rejoins that he accounted *modo sequente*, viz.: that thieves broke into the counting house and stole it, and that he acquainted the plaintiff, and *hoc paratus est*, &c.; and on demurrer it was resolved that the rejoinder was no departure, for, though it contained new matter, yet it was in pursuance of the former, since showing that he was robbed amounted to giving an account.

Per Curiam. The defendants were bound to do the first act. They ought to have executed the conveyance and tendered it to the plaintiff, and if the plaintiff's counsel ought reasonably to have advised such a conveyance, it would have saved the penalty. If the plaintiff refused the deed, when tendered before the day, the propriety of the deed would come on to be tried by due course of law. The defendants having failed to do it, the plaintiff is entitled to judgment on the merits of the case.

As to the point of departure, the cases adduced by the plaintiff clearly show that it would have been deemed such in England. But it is said the practise here varies. We are of opinion, when the defendants called on the plaintiff to reply to their plea, they voluntarily relinquished and waived the liberty reserved to them of giving the special matters in evidence, and that the rejoinder afterwards amounted to a departure. Let judgment, therefore, be entered for the plaintiff, and a writ of inquiry issue to ascertain the damages he has sustained.

AT NISI PRIUS, AT WESTCHESTER,
SEPTEMBER ASSIZES, 1791.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

ABRAHAM CORNOGG *vs.* ISAAC ABRAHAM and JANE, his wife,
DANIEL CORNOGG, and GEORGE GEORGE, executors of DANIEL
CORNOGG, deceased.

Objection to a witness, when the matter is doubtful, shall be restrained to his credit.

A witness who has no decided interest in the event of the cause, shall be received.

A clear mistake appearing in the award of arbitrators, shall be rectified.

ASSUMPSIT for 10*l.* specie and 700*l.* continental money, devised to the plaintiff by his father's will.

The defendants gave in evidence an agreement signed by the eight different children and devisees, referring the division of the estate of the testator to three persons amicably chosen between them, and the award of the arbitrators thereon, filed in the register's office. They contended that six of the said children had conformed to the award, and had received their distributive shares in pursuance thereof, and that the plaintiff was concluded thereby at common law, the same being made by judges of his own choosing.

The plaintiff urged that the arbitrators had, on full consideration, agreed on a prior award, and signed the same, which was showed to the said children, and was variant materially from the present; and that the plaintiff and one Thomas Francis, who had married with a daughter of the testator, understanding that the arbitrators were about to reconsider the same, and make a new award, had revoked their authority, and directed them not to proceed further, and cited 1 Bac. Abr., 134, 137; Dall., 335.

The said Thomas Francis was offered to prove these facts, and was objected to by the defendants' counsel, as interested in the *question* to be tried, inasmuch as his distributive share of the estate remained unpaid. Vide 10 Mod., 290, 292; 1 Stra., 129; 3 Burr., 1857.

It was also insisted for the defendants, that in the case of commoners, no commoner is allowed to give evidence in an ac-

tion concerning the right of common in another. So in the case of underwriters, they are never permitted to be called as witnesses in an action on the same policy, which they have subscribed, though they are not interested in that suit, as the verdict cannot be given in evidence in any other action. Bull. Ni. Pri. 279, 4to ed. 283. 12mo ed. Neither can a co-obligor give evidence in an action on the bond which he himself has executed, because interested in the question to be put to him. 1 Term Rep. 297, 303. They therefore concluded that Francis was an incompetent witness, and further cited 5 Burr. 2729. French v. Backhouse and Foulston, Dall. 372. Steinmetz et al. v. Currie.

E contra it was argued for the plaintiff, that the objection to the witness goes to his credibility and not to his competency, and the tendency of the Courts of law of late years had been to confine rather than to increase objections to the competency of witnesses. Whatever may be the verdict in the present cause, it cannot be given in evidence either for or against the witness in any future suit which he may bring for his distributive share. The case in 5 Burr. 2729, is not applicable to the present; the suits there were brought not against each defendant for his proportion of the insurance money, but against each for the whole of it; and consequently the verdict against one of the joint owners would affect the other of them, because that other would be obliged to contribute. They also cited and much relied on 4 Burr. 2251. Abraham *qui tam* v. Bunn, and a case determined in the Supreme Court, M'Kimm v. Elton and M'Farland, wherein one Levinz, though interested in the question to be tried, was allowed to be a competent witness, after long argument.

Per Curiam. "The distinction between *interest* which goes to the competence of a witness, and *influence*, which goes to his credit, is clearly settled since the case of Abraham v. Bunn; and the rule is now established, that where the matter is doubtful, the objection shall go to his credit." 4 Burr. 2255. Francis is not interested in the event of the present cause. He can derive no certain decided gain or loss from the determination of this action. The verdict cannot be given in evidence in any suit brought by him against the defendants as executors of his father. He does not come forward to invalidate his own act; he is produced to prove that the arbitrators have pursued the authority delegated to them, and have made an award which should be sanctioned. We think with Lord Hardwicke, that "objections similar to the present, should be restrained to the credit rather than the competency of the witness, unless it

is like to introduce great perjury, because it tends to let in light to the cause" (Hardw. Cas. 360); and with Justice Buller, that "the most solid ground is to confine the objection to a witness an interest in the event of the cause." (1 Term Rep. 302.) We therefore apprehend the witness should be sworn and his evidence left to the jury, who ought calmly and dispassionately to weigh the prejudice, influence, or bias upon the mind of the witness, and judge of his credibility.

Francis was sworn accordingly. Vide 3 Term Rep. 27, 34, 36, 309, 310.

The award of the arbitrators, relied on by the defendants, contained the special statement of their administration account. It appeared that the testator had died in *March* 1780, possessed of 610*l.* 17*s.* continental money, and that the bulk of his personal estate had been appraised in the inventory at the specie value, which had been carried out in the account into a continental column at the rate of 40 for 1. The different items of payments in continental currency credited to the executors amounted to 2039*l.* 7*s.* 6*d.* exceeding the amount of the continental money he died possessed of, by the sum of 1429*l.* 0*s.* 6*d.* It was evident therefore on inspection of the account, that if all those payments had been made in *March* or *April*, 1780, when the scale of depreciation fixed the value of continental money at 61½ for 1, the executors would have derived a profit of at least 6*s.* 7*d.* in each pound specie, thus carried out at 40 for 1, to pay the balance of 1429*l.* 0*s.* 6*d.*; consequently there was a clear mistake in calculation apparent on the face of the account, which every principle of justice and law called on the Court to rectify. The Court having expressed their sentiments fully on this head, that the account required re-examination, and that the executors were only entitled to a credit of the real value of the said 1429*l.* 0*s.* 6*d.* according to the true depreciation of the different payments by them made, it was at length agreed to withdraw a juror, and submit the account of the executors by rule of Court, to three judicious men, to be re-examined and settled by them.

Messrs. Sergeant *pro quer.*

Messrs. Wilcocks and T. Ross *pro def.*

AT NISI PRIUS, AT NEWTOWN,
OCTOBER ASSIZES, 1791.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

RICHARD FENN, lessee of HENRY WALMESLEY, *vs.* SARAH READ
and ESTHER READ.

Will proved before the register, or under a feigned issue, has always been received as evidence, but such probate is not conclusive evidence of a devise of lands. Where the special instructions for drawing a will are proved by two witnesses, and a will is drawn conformable thereto in the testator's lifetime, though he does not execute the same, it is a good will in writing under the act of assembly of 1705.

EJECTMENT for two fifth parts of certain lands in Southampton township. It was admitted that Thomas Walmesley, the father of the lessor of the plaintiff, had died seized of these lands, and left issue four children, of whom the plaintiff was the eldest.

The defendant's counsel offered to show in evidence to the jury, that on a *caveat* having been filed against proving a paper purporting to be the will of Thomas Walmesley, the register, at the request of one of the parties, had sent an issue into the Court of Common Pleas of Bucks county, to try the fact; that upon a full trial and hearing, a verdict had passed establishing the validity of the will, and that hereupon the will had been declared to be proved, and letters testamentary had issued thereon.

This testimony was opposed by the plaintiff until the witnesses, who were in full life, and present, should be produced. But the Court overruled the objection, declaring that a will proved by the register, with the depositions of the witnesses, or under a feigned issue, had always been received as evidence; but whether the same was conclusive or not was another question.

Per Curiam. Let the will and probate be read.

This having been done by the defendant's counsel, and there appearing to be a devise therein of the lands in controversy to the defendants, they would proceed no further. They contended that they were not bound to call any witnesses, and that the evidence by them adduced was sufficient and conclusive as to the matter in dispute. They urged that the words of the act of assembly of 4th Annæ, passed in 1705 (old ed. p. 14) expressly direct, that wills in writing proved by two or more credible wit-

nesses within this commonwealth, or, in the Chancery of England, and the bill, answer, and depositions, transmitted hither under the seal of the Court, or in the Hustings or Mayor's Court, in London, or in some manor Court, or before such as have or shall have power in England or elsewhere, to take probate of wills and grant letters of administration, and the copy of the will and the probate thereof annexed, shall be good and available in law as well for the conveyance of the lands thereby devised as the goods and chattels therein bequeathed; that the copies of such wills shall be deemed matter of record, and shall be good evidence to prove the gift or devise thereby made. The judgment of every Court having jurisdiction over a subject matter, is in itself conclusive proof of the fact, and carries with it absolute verity. It could never be intended by the legislature, that a will proved in England by two witnesses, according to the act, should be full and complete evidence, and that a will proved here should be insufficient without the production of the witnesses at the trial. The evident meaning of the act of assembly passed 28th February, 1780, erecting a High Court of Errors and Appeals, was, that after a verdict establishing the validity of a will on an issue sent by the register into the Court of Common Pleas, the said facts should not be re-examined on an appeal or otherwise. And so of the 18th section of the act of last sessions, passed 13th April, 1791.

On the part of the plaintiff, it was argued that the Common Law Courts had an exclusive jurisdiction to try the issue of *devisavit sive non*, both in England and this state. The probate of a will is undeniable evidence as to goods and chattels, but not as to lands. 1 *Ld. Raym.* 262, 731, 735. Every several devisee must make out his title in a new cause. 3 *Cro.* 396. Probate of a will is no evidence as to real estate. 2 *Stra.* 961. The act of assembly of 10th *Annæ* (old ed. p. 50) restrains the powers of the register-general and his deputies to all such judicial acts as do or shall belong, or ought of right to be done by any persons having power, by law, to take probate of wills and grant administration; and the general words of the act of 4th *Annæ* must be considered as subject to this restriction. The Spiritual Courts in England have the sole power over testaments of personal estate, and chancery cannot interfere with them. 1 *Vez.* 119, 284. In the case of the lessee of Israel Robinson et al. *vs.* Moses Robinson, tried at Reading, November assizes, 1781, the plaintiffs claimed under a will dated in 1769, which was regularly proved, and letters testamentary issued thereupon. The defendant made title under a deed from his father, dated in

1772, and a second will in the same year in confirmation of it, which was afterwards set aside on a hearing before the register and assistant justices in 1774. There the whole facts respecting the sanity of old Israel Robinson, at the time of the execution of the deed and will, were fully investigated. The act of 1780 left the effect of the register's powers as it stood before, and merely superadded the right and mode of appeal from his decision.

Yeates, J. I was present when the cause of the lessee of Joseph Cook and executors *vs.* George Brown, came on trial at Carlisle, June assizes, 1774, before Chew and Morton, and have taken full notes of the argument. The suit was brought professedly to try the validity of the will of Thomas Brown, which had been regularly proved on a *caveat* filed and hearing before the deputy register and assistant justices. In that cause the defendant's counsel, who argued in support of the will, contended merely, that the will as proved was good evidence to lay before the jury, but abandoned the idea of its being undeniable and conclusive evidence as to the real estate. They insisted barely, that the adverse party must encounter it with other proof in order to invalidate it. The opinion of the Court was conformable thereto. The depositions of the witnesses taken before the deputy register and justices, were directed to go to the jury, and the plaintiff had liberty to contest the execution of the will or sanity of the testator, by introducing other evidence. The Court said, that "the point of *devisavit sive non*, must be submitted altogether to the jury, upon a trial relating to the title of lands, on the proof adduced to them." It appears evident, that taking the arguments of the defendant's counsel in the strongest point of view, the decision on the feigned issue could only affect the parties to the *caveat*. As to other contending parties, it would be *res inter alios acta*. But suppose on an ejectment brought to try the validity of a will, it should be offered to be made appear, that the person whose will was attempted to be established was still in full life, or that the subscribing witnesses who had proved it had been convicted of perjury therein, or that the crimes of forgery or perjury could be fully proved by evidence at the bar, could it be reasonably urged that the copy of the will and depositions were still incontrovertible and conclusive evidence to the jury?

The chief justice then delivered the opinion of the Court:

We conceive that the copy of this will, as proved under the feigned issue, has been rightly suffered to be given in evidence to the jury, in pursuance of the express words of the act of

assembly of 4th Annæ, but that there is nothing in this act compared with and restrained by that of 10th Annæ, or the act of 1780, erecting the Court of Errors and Appeals, or in the act of 13th April, 1791, or in any other act that we know of, which shows an intention in the legislature, that such a probate should be conclusive evidence of a will of lands. This Court cannot wish the law was so. Suppose the utmost integrity and ability to be possessed by every register, they are still subject to err; and if even the fullest hearing has been had of all the contending parties, which is not generally the case, still new evidence and additional circumstances may turn up, which would weigh greatly in the scale of justice. We are of opinion, that the plaintiff in the present instance may give evidence of insanity, duress, forgery, fraud, undue influence, &c. in or upon the testator. We cannot compel the defendants to give further testimony, but the plaintiff may examine the witnesses who gave evidence in support of the will, on the feigned issue, and produce any other testimony to impugn the will, and the jury upon the whole, must form their judgments under the direction of the Court. This mode of proceeding may appear awkward, but we are reduced to the dilemma by the positive words of the act of 1705, and we cannot help it.

The plaintiff's counsel then called the defendant's witnesses, who had been subpoenaed to prove the will, and proceeded to the examination of them; but the defendant's counsel were at length permitted to take the proof into their own hands, in order to establish the will. While these witnesses were in the possession of the plaintiff, the measure appeared sufficiently *outré*.

It appeared upon the proof, that in the fall of 1787, Thomas Walmsley (the deceased) had desired one Daniel Livezey to draw his will, and gave him particular verbal directions concerning it; that on the 11th February, 1788, he repeated the several devises to him, and requested him to have it ready by the 14th following; that at the time appointed Livezey went to his house, where he mentioned the particulars of his will to him a third time, and in consequence thereof, Livezey procured one Ezra Crosdale, the same day, to reduce it into writing exactly conformable to the testator's directions, and brought it to him ready drawn. Livezey asked him if he should read the will to him; he answered, it was no matter, he was then too poorly to sign it, but hoped he would be better in the morning, and would then put his name to it. On the second interview, he

complained to Livezley that the drawing of the will had been so long neglected. He died about two hours after the written will was brought to him, in a fainting fit, without executing it.

On the same 11th February, 1788, testator complained to one Henry Ridge that he was uneasy in his mind that his will was not perfected, mentioned his earnest desire that Daniel Livezley should draw his will, and that he had given him special directions for that purpose. The particulars of these directions he repeated to Ridge.

The intentions of the testator as to the general disposition of his property, and the reasons and grounds of his bequests, were also proved by other witnesses in corroboration, to show that the settled purpose of his mind, for some years previous to his death, had been that his will should be drawn agreeably to the instructions given to the said Daniel Livezley. Those express instructions given to the said Livezley by the deceased, as related by him on the 11th February, at different times of the day, were proved by two witnesses; and the testator's recognition, on the day of his death, that he had given the said Livezley directions to draw his will, was proved by three witnesses.

On the part of the plaintiff, it was contended that the will in question was not proved by two witnesses, agreeably to the act of assembly of 1705, and the following cases were cited: 2 Blackst. Com. 376, 389, 499, 500; Swinb., 5, 6, 56; Cro. Eliz., 100; 8 Vin., 119, *Bartlet vs. Ramsden*; 8 Atky., 156, 161; *Dallas*, 278; *Godolph.*, 15.

For the defendant, it was urged that judges will lean in favor of wills (1 Burr., 420, 421). A will in Pennsylvania need not be signed or sealed by the testator, nor subscribed by the witnesses (Dall., 94). The writing of a will from the mouth of witnesses is sufficient, and it need not be from the mouth of the testator; and, though the deviser becomes senseless before the will be written, yet if it be written before he dies, it is a good will in writing (*Alleyn*, 54, 55). In the present instance, there could be no doubt but the written paper corresponded with the testator's intentions; and his special directions for drawing it were fully proved by two witnesses, within the words and spirit of the act of 1705. Other cases cited *pro def.* were 5 Bac. Abr., 507, 508; *Plowd.*, 345; *Dyer*, 72; *Godolph.*, 6, 11, 12; *Swinb.*, 51, 52, 53, 56, 353, 354; 2 *Stra.*, 764.

And of this opinion were the Court in their charge to the jury, provided credit was justly due to the two witnesses, who proved

the special instructions for drawing his will, said to be given by Thomas Walmesley in his life time.

Verdict for the defendants.

Messrs. Ingersol and Sitgreaves, *pro quer.*

Messrs. Sergeant, Wilcocks, and Wm. Ewing, *pro defts.*

AT NISI PRIUS, AT EASTON,

OCTOBER ASSIZES, 1791.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

JAMES CLYDE *vs.* JOHN CLYDE.

Large damages directed to be given, to compel a defendant to do justice.

Though one cannot claim title to a water-course but by deed, yet in special assumpsit for damages on a breach of promise, it may be proved by oral testimony.

One shall not be a witness to disaffirm his own contract.

SPECIAL assumpsit for the privilege of a water-course through the lands of the defendant.

The case was, Andrew Allen, Esq., being seized of five hundred acres of land in Allen township, in 1772, contracted with the plaintiff to convey him one moiety thereof, and agreed that he should have the pre-emption of the remaining moiety within a limited time. The defendant, his brother, and one Hugh Horner afterwards agreed to join with him in the purchase of the whole tract, and they stipulated with each other previously respecting the particular parts each should have; and that, as a stream of water ran through the lands, those who possessed the lower places on the stream should have the privilege of a water-course through the upper places, to convey the water to their respective lands. The purchase was at length completed from Mr. Allen. Horner took the upper place, the defendant the middle tract, and the plaintiff the lower, on the stream. The plaintiff, to suit his brother's convenience, and throw his lands into one compact body, exchanged with him fifty acres of land on the east side of the creek for the same quantity on the west side. In the event, defendant would not comply with his contract in suffering his brother to have a drain through the middle tract, though of little or no injury to himself, but carried the water above his division line into the creek, and thereby

prevented the plaintiff from watering eighteen acres of valuable meadow, which he possessed below. Repeated references were had between the brothers to neighbors, and the defendant always promised to give his brother a right to the water, but when the matter appeared to be concluded between them, he uniformly broke his engagements. There appearing to be much vexation and highly improper conduct on the part of the defendant, and the plaintiff's counsel agreeing to release the damages which might be found for him in case a proper grant of the water-right should be made to him by his brother, agreeably to the original contract, the jury, under the direction of the Court, found a verdict for the plaintiff for 500*l.* damages to compel his unnatural brother to do him justice.

In the course of the trial, Michael Clyde, the father of the parties, was offered as a witness by the plaintiff, to prove the original contract, as to the benefit of the water-course being reserved to the lower tracts of land, but he was objected to by the defendant's counsel, who cited Gilb. Law Evid., 108, that a man cannot claim a title to a water course but by a deed and under seal. But to this it was answered, and so ruled by the Court, that this suit is for damages on a breach of promise, which surely may be proved by oral testimony; and he was sworn accordingly.

Hugh Horner was also offered as a witness by the defendant, to show that the original contract did not extend so far as was contended for by the plaintiff; but he was objected to because he was brought to invalidate or disaffirm his own contract, which the law will not permit; and his testimony was accordingly overruled by the Court. 1 Term Rep. B. R. 800.

Messrs. Ingersol and Sitgreaves *pro quer.*

Messrs. Read and W. Smith *pro def.*

[See the cases lessee of John Hughes *vs.* Henry Dougherty, and lessee of Morgan Sweeney *vs.* John Jones, determined at Sunbury, October assizes, 1791, the reports whereof I have been favored with by Mr. Justice Bradford.]

JANUARY TERM, 1792.

PRESENT—M'KEAN, CHIEF JUSTICE—SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

MOSES GORGERAT, FRANCIS GORGERAT, and JOHN BARNES,
vs. WILLIAM M'CARTY.

The possession of a bill of exchange and protest, is not sufficient evidence, without further proof, in a suit by the payee or indorsee against the acceptor, of a subsequent indorsee's having received the amount of the bill. In bills payable to order, there is a distinction between those which are indorsed in *blank*, and such as are *specialy* indorsed. Possession in the former case is evidence of title, but not in the latter.

Bill of exchange lost, and an indorsement forged thereon, and the money paid by the acceptors (who were of the same house with the drawers), the real payer shall recover the money.

THIS action was brought on three bills of exchange, dated 19th December, 1786, and drawn upon the defendant by the plaintiffs, for 3,545 livres and two sols, each, to be paid to their order. These bills were indorsed by the plaintiffs to Paul Ant. Faure & Co., and by them to others. Defendant accepted the bills, but they were protested for non-payment. Plaintiffs, in their declaration, aver the payment of them with costs and damages to the last indorsee by Paul Ant. Faure & Co., and that the *plaintiffs repaid* the costs and damages to them. A trial was had in July term, 1790, and a verdict had for the plaintiffs for 911*l.* 13*s.* 5*d.*, besides costs of suit, subject to the opinion of the Court on a point reserved, to-wit: Whether the possession of the bills and protests be "sufficient evidence without further proof" that the plaintiffs had paid the subsequent indorsee the amount of the bills, or whether it be *prima facie* evidence sufficient, unless contrary evidence be produced on the part of the defendant?

This reserved question was argued last September term by Messrs. Rawle and Du Ponceau for the plaintiffs, and Mr. Ingersol for the defendant.

The plaintiffs' counsel relied greatly on the case of *Morris vs. Foreman*, Dallas 193, and further cited 5 Burr. 2688, that *prima facie* evidence is conclusive, until contracted; also, the ordinances of Louis XIV. that the bearer of a bill may prosecute it for payment.

For the defendant, was cited 1 Lord Raym. 742. *Mendez vs. Careroon*, and much relied on, which is taken notice of in *Lovell* on bills of exchange, 177. But as the arguments on both sides were fully taken up and considered by the Court, in giving their opinions, *seriatim*, they are here omitted.

The Court, this term, gave their opinions:—

M'Kean, C. J. The acceptor of a bill of exchange is only liable to the last indorsee; for all the prior indorsers have parted with their interest in it, and are presumed to have received a valuable consideration for it, and therefore can have no right to the money a second time. But if the last indorsee protests the bill for non-payment, and afterward receives back the money from a prior indorser, such indorser acquires a *new title* to receive the money from the acceptor, by such payment. So that at the time this action was commenced, the defendant was liable to no person but the last indorsee, or the prior indorser who had paid him. This is by the custom of merchants, as appears by the case of *Death vs. Serwenters*. Lutw. 888. *Lewin vs. Brunette*, Lutw. 898. The plaintiffs have accordingly alleged that they paid the subsequent indorsee, but offered no proof of it except the mere production of the bills and protests. This is not sufficient; they should have produced a receipt from the last indorsee, or some witness or evidence of payment. The usual evidence in such a case is a receipt at the foot of the protest. 1 *Ld. Raym.* 742. In that case, the merchants who had been sworn respecting the custom, were of opinion that *this* was the *only* evidence; but I agree with Lord Holt, that if payment be any way sufficiently proved, it is sufficient.

If the defendant should pay the plaintiffs the amount of the bill, and the last indorsee should hereafter sue him, what can prevent him from recovering the money? The defendant cannot prove that he had been paid by the plaintiffs, who may have come to the possession of the bills by trover, bailment for a special purpose, or by fraud. Why was not the action brought in the name of the last indorsee? If it had, the holding of bills might have raised a presumption that the plaintiffs were agents for him. The case in 1 *Lord Raym.* 742, is in point. There the plaintiff not only had possession of the bill, but he had been sued by the subsequent indorsee, and had a judgment against him. What might be admitted as *prima facie* evidence in other cases, will not do in such a case as this, by reason that the custom among merchants is otherwise, which appears from all the writers and collectors of cases from the report by Lord Raymond until the present time, to be considered as the rule. I am therefore of opinion with the defendant.

Shippen J. I concur. I acknowledge that on the argument, I thought differently, from an apprehension that the course of mercantile negotiations might be obstructed. But on considering the case immediately after last term, I was fully satisfied that both on principle and by law, the mere holding of a bill of

exchange cannot entitle an intermediate indorsee to call upon the acceptor for payment. Upon principle, it cannot be. Because, when a man indorses an accepted bill, he parts with all his right to the indorsee for a valuable consideration, and *as to him* the acceptor is discharged. The right of calling upon the acceptor can never be regained but by taking up the bill from the last indorsee, and paying him the money. Some evidence of this payment must be necessary, otherwise one who finds or steals the bill might sue the acceptor, and he would be answerable again to the last indorsee, who, never having received satisfaction, would surely recover from the acceptor. The usage, upon inquiry, I find to be *now* what it appears to have been in Lord Holt's time, that when the last indorsee receives the money from an intermediate indorser, he gives a receipt upon the protest. This always accompanies the bill, and shows who has the legal and equitable right to sue the acceptor.

The case of *Mendez vs. Careroon*, in 1 Ld. Raym. 742, does not stand alone. In 1 Lutw. 888, the same principle appears in an adjudged case upon a writ of error. The Court say that when the payee has once indorsed the bill, the acceptor is entirely discharged as to him, unless he becomes again entitled to receive the money by an actual payment to the indorsee. Some later cases have the same aspect, and no case appears to the contrary.

Yeates J. The difficulties which struck my mind on the argument of this cause at the last term were, that an idea seemed to be generally entertained, that payment to the holder of a bill of exchange would discharge the acceptor under the authority of *Morris vs. Foreman*; Dall. 193; and that if additional evidence to the possession of the bill was required, it might throw these valuable mediums of trade under considerable difficulties.

On the first point my mind was fully made up in the vacation by consulting the cases of *Ancker et al. vs. The Bank of England*, Doug. 615; and *Allen, administrator, vs. Dundas*, 3 Term Rep. 129. In the latter case, *Shepherd, pro quer.*, cited the following resolution, *coram Buller J.*: "In *Cheap and other vs. Harley and Drummond*, a few days ago, at the sittings here, the defendants, who had a house in America as well as in London, drew two bills of exchange *there*, the first and second of the same tenor and date, on their house here, payable to the plaintiffs. One of them being lost, came into the hands of a third person, who forged an indorsement of the payees, and received the amount of it from the defendants here; and after-

wards the real payees brought their action upon the latter bill and recovered."

This resolution effectually establishes the point that payment by the acceptor of a bill of exchange to the holder does not necessarily discharge him. See also 4 Term Rep. 28. Nor ought it, upon the most solid grounds.

When an indorser, according to the usage of merchants, parts with his right by an indorsement, and the bill in this state is accepted, the acceptor is liable *only* to the person in whom the right of the bill is vested, and until an intermediate indorser has power to demand it, either under the authority of the last indorsee, or by payment to the last indorsee regains a right to the bill, he has no claim whatever against the acceptor.

It is true, that in the case of *Dehers et al. vs. Harriot*, 1 Show. 163, it was held that on a bill of exchange made payable to A, who indorses it to B, who indorses it to C, which is protested for non-payment, B may bring an action on this bill against the drawer, notwithstanding his endorsement. But it is to be observed in this cause, that the indorsement to B was special. "Pray pay to B value on my account;" and in Sir Bartholomew Showers's argument he says, p. 164, "We had proved on the trial, C had no interest in the moneys, and was to receive the money for the plaintiff as his servant."

The case in 1 *Ld. Raym.* 742, is expressly in point, and is recognized by the latest writers on the law of bills of exchange; viz: *Cunningh. on Bills of Exchange*, 47, 91; *Loveless on Bills and Notes*, 179; *Kyd*, 150.

Besides, the plaintiffs in their declaration, with strong reason, aver the payment of the bills with costs and damages, by Faure & Co. to the last indorsee, and that the plaintiffs repaid the same to them. If it was necessary for the plaintiffs to make these averments, in order to sustain their suit, it surely must be more than matter of mere form; and I apprehend if the laying of the payment to the last indorsee was indispensable, that the proof of it must be equally indispensable.

Nor do I think that this doctrine will throw bills of exchange under any unreasonable difficulties. By obtaining a receipt from the last indorsee at the foot of the protest, every difficulty is obviated in the case of all the other indorsers. My opinion, therefore, is, that though the holding of the bill is a circumstance to show that the possessor is entitled to the money due thereon, yet it is not of itself sufficient evidence for this purpose according to the rules of law and the usage of merchants. *Vide* 4 Term Rep. 32.

Bradford, J. It seems to be fully settled in *Death vs. Serwenters*, Lutw. 888, that by a special indorsement of a bill of exchange, the indorser parts with his right, and discharges the acceptor as to any payment to him, and that he can regain it only by taking up the bill and making payment to the last indorsee, in whom the property of it is vested. The same doctrine is laid down in *Brunette vs. Lewin*, reported in Carth. 130, and afterwards in error in Lutw. 896, where it is held that if the bill is specially indorsed, he cannot recover, unless at the trial there be evidence of the payment to the last indorsee.

This payment, therefore, is a material part of the plaintiffs' case. They themselves state it as such in their declaration, and rightly; for it is clear from the case of *Brunette vs. Lewin* that if it were not stated, the omission would be fatal. Carth. 130. Being a material fact, it must be proved.

The plaintiffs do not appear to deny this; but they contend possession of the bill is *prima facie* evidence of property in it. This is indeed the case with bills payable to bearer, and sometimes when the bill is payable to order. But among bills payable to order there is an obvious and familiar distinction between those which are indorsed *in blank*, and such as are *specially indorsed*. Possession of the former is evidence of title, and Lord Mansfield assigns the reason in *Peacock vs. Rhodes*, Doug. 611. "Bills indorsed in blank," says he, "are considered as bills payable to bearer; both pass by delivery. Possession is in both cases proof of property in them."

When the indorsement is *general*, the holder may strike out all the indorsements but that of the payee, and declare as indorser to him; but when it is *special*, the name of the proprietor appears on the face of the indorsement, and the holder must derive his title through him.

The last indorsee may transfer his right either by his indorsement, or by accepting payment from the indorser. If the first had been the case before us, and the present plaintiff had claimed as his indorsee, it is clear they must have proved his hand writing. Possession would have been no evidence of that. Why then should it be evidence of payment? The one is a fact as material as the other, and it is as easy to prove a receipt as to prove an indorsement.

But the case of *Mendez vs. Careroon*, 1 Ld. Raym. 743, if it be law, goes the whole length of determining the point in question. It was doubted at the bar, but I agree with the rest of the Court, that there is no ground to suspect its authority. It is neither denied, nor doubted, nor is the principle shaken in any subsequent case; on the contrary, it has all the support which

we can reasonably expect, that of its being handed to us in our abridgements and elementary treatises as established law. We find it in 4 Vin., 265, in the digest of adjudged cases in the King's Bench, and in all the law dictionaries. It has been already mentioned that it is twice quoted by Cunningham in his treatise on this subject, introduced by Lovelass, who published his book in 1789, and by Stewart Kyd, whose preface bears date in October, 1790.

If this case needs any further confirmation, it strikes me that the same principle is to be discovered in *Pigot vs. Clark*, reported in 1 Salk., 126, and 12 Mod., 192. There the plaintiff, who was the payee, had indorsed the bill, and afterwards brought this action against the acceptor; it was objected that the plaintiff's right had been transferred by the indorsement, and that *he* could not maintain the action. But the Court held that the indorsement being in *blank* did not necessarily import a transfer, and add, "But if the blank had been filled up, the *indorsee* alone could have maintained the action."

This at once establishes the distinction between a *general* and *special* indorsement, and implicitly declares that the possession of a bill specially indorsed is no evidence of a right to its contents.

But the plaintiffs rely on the case determined in this Court between *Morris vs. Foreman*, in the report of which it is said the Court held that "the possession of a bill of exchange is evidence of an authority to demand its contents" (Dall., 193). It is to be observed that this is but a short note, without any state of facts; and, on inquiry, it seems to me that the language of the report is more extensive than the principle of the case will warrant. I have examined the record, and into the facts of that cause, and, that the decision may be understood, I will state them. It was an action between the original parties, brought by the payee against the drawer, upon a bill drawn, during the late war, on a British subject, and under a particular agreement respecting damages in case of protest. Morris remitted this bill to London *on his own account*, to Messrs. Clifford and Tysett, who had no manner of interest whatever in its contents, but with this indorsement, "Pay to the order of Clifford and Tysett." The bill being protested, this action was brought. The indorsement was not set forth in the declaration, but appeared on the bill and protest, and thereupon the defendant moved for a nonsuit, and insisted that the action could be brought only by the indorsee; but the Court held that the action was maintainable in the name of the plaintiff. Under the circumstances before them, the Court, doubtless, considered the indorsement as a mere au-

thority to receive the money for the plaintiffs, and not as a transfer of interest. In this view it is no more than was ruled long before in *Dehers et al. vs. Harriot*, already cited by Mr. Justice Yeates (1 Show., 164). In strictness, perhaps, it ought to appear on the face of the indorsement, whether it were intended as a transfer, or as a mere authority (2 Burr., 1227). But, be this as it may, the principle on which the case of *Morris vs. Foreman* seems to have been determined, does not in any degree interfere with the present decision.

The inconveniences which might result from so strict a rule of evidence were strongly urged, and struck me forcibly on the argument. But, on a closer inspection, they will, in a degree, disappear, or be found to be balanced by opposite advantages. The payee may avoid them, if he pleases, by a *general* indorsement, which is now the most common, and is said to be the most proper one. But if he will restrict the payment to a particular person, and the bill comes back, he must submit to the inconvenience he himself has created. Nor is the inconvenience greater than that to which every special indorsee is subject, who must prove the hand-writing not only of the first, but of every indorser through whom he claims. The difficulty of tracing the payment to different indorsees may be avoided by a general receipt of the last indorsee.

Besides, it is a real benefit to the mercantile world that the bills may be thus restrained. It is a desirable security against accident or fraud. Even bank bills, generally payable to bearer, are framed in this manner for distant remittances. Being made payable to order, they are specially indorsed, and the payment being thus restricted to a particular person, the remittance is put out of hazard. The right of the indorsee appears on the bill; the bank is bound to pay the money to him or to his order, and if they pay it to any one else, it is clear, from *Doug.*, 617, and 3 Term Rep., 129, cited by Mr. Justice Yeates, that they must pay over again. To admit that possession is any evidence of right in this case, would be to make all bills in effect payable to bearer. It would destroy the security intended by a special indorsement, would multiply losses, and increase the temptations to theft.

I have taken no notice of the ordinances of France cited by one of the plaintiffs' counsel. This is not a question of general law, but a question of evidence, which must always be regulated by the particular rules of that tribunal to which a plaintiff applies himself for relief. A bill of exchange is the same thing in England and in France, but in the one the protest is sufficient evidence of the bill; in the other, the bill must be shown itself.

Upon the whole, I am fully satisfied, that as the plaintiffs gave no sufficient evidence of payment to the last indorsee, they are not entitled to a verdict.

Judgment for the defendant, as in a case of nonsuit.

[See 3 Wheaton, 182, contra.]

MARY JACKSON *vs.* SAMUEL ROBINSON, surviving executor of
ELIZABETH VANDERSPIEGEL.

The words "goods or movables" in a will, may include bonds, unless there is something in the context of the whole will to restrain the construction.

SUIT for a legacy. Defendant pleaded *non assumpsit* and payment. Plaintiff replied *non solvit* and issue. The plaintiff rested his claim on the following words in the will: "I give and bequeath to Mary Jackson, the wife of William Jackson, all my wearing apparel, household and kitchen furniture, plate, linen, books, and every kind of moveables whatsoever."

The testatrix had also devised 50*l.* to the Wicacoe Lutheran church, 150*l.* to the Lutheran church near Philadelphia, 100*l.* to Robert Hopkins, and 50*l.* to each of his children. Then followed the legacy to the plaintiff. She then directed 200*l.* to be put out at interest for the benefit of a black girl who was born in the family, and who was to be taught to read, &c. She likewise bequeathed several other pecuniary legacies, and devised the rest and residue of her estate to William Jackson (husband of the plaintiff), Andrew Jackson (their son), and Samuel Robinson, and appointed the said William Jackson and Samuel Robinson her executors. She died possessed of personal property consisting chiefly of bonds, amounting to 2000*l.* and upwards, leaving no real estate.

In the will as originally drawn, the wearing apparel only was devised to the plaintiff, but the other words, "household and kitchen furniture, plate, linen, books, and every kind of moveables whatsoever," were afterwards added by the scrivener, at the desire of the testatrix, and a memorandum made of this addition by the witnesses before subscription.

The plaintiff had received from the executor the wearing apparel, furniture, &c., and the sole question was, whether under the general devise of "every kind of moveables whatsoever," the plaintiff was entitled to the obligations of which the testatrix died possessed.

Mr. Rawle for the plaintiff contended, that a specific legacy will obtain against a pecuniary one; and to show that under the words "goods or movables," choses in action are included,

and will therefore pass by will, cited 12 Co. 1 b. 1 Atky. 171, 172, 177, 180. 4 Mod. 156. 1 Vez. 369. 8 Co. 33 b. 1 Wms. 267. In some instances the locality of the moveables is considered, as in 1 Vez. 273. Brown's Cha. Rep. 127.

Messrs. Sergeant and Tilghman, for the defendant, did not deny that a specific legatee would take place of a pecuniary one, but insisted that, by the words of the bequest to the plaintiff, the obligations could not pass; for, under such construction, all the other legacies in the will would be destroyed, and the testatrix's intentions be effectually frustrated. Besides, she appoints the husband and son of the plaintiff as two of her residuary legatees. How can this bequest take effect, or the black girl be taught to read and write out of the fund intended for her benefit, if the plaintiff can sustain her claim to the outstanding bonds? It must be obvious that the term "moveables" must be confined to things of the same nature as those before described.

Per Curiam. This appears to us a very plain case. The words "goods or moveables" may include bonds, unless there is something in the context of the whole will to restrain or qualify the construction. But, in the present case, the affixing of such a sense to the words, would evidently defeat the whole intention of the testatrix. It would be taking away all from the other legatees and give it to one only; it would prevent any *residuum* which the testatrix had in contemplation; besides, from the face of the will, it appears that she originally designed to the plaintiff her wearing apparel only. She afterwards added the other words, which, if the whole will is to be taken together, and every clause thereof is to take effect, must necessarily be supposed to extend to moveables only, in the common and usual acceptance of the term. Let there be a verdict for the defendant, but if the plaintiff's counsel are dissatisfied they may move for a new trial.

Verdict *pro def.*

(Vid. Will. Jones, 225; Barnard Cha. Rep., 259, that under a devise of "goods," bonds or money will not pass.

JOSEPH GALLOWAY *vs.* HENRY NEGLE.

Notice in writing of an intended motion for a new trial is indispensably necessary.

THIS cause had been tried at the last sittings for Philadelphia county, and a verdict had passed for the plaintiff, with a deduction of seven and a half years interest, accrued during the war, the same being a British debt. A motion for a new trial had been made on this ground by Messrs. Tilghman and Ingersol for the plaintiff, on the first day of this term. They said the dispute respecting the interest was rather to be considered as a point reserved by the Court, on trial, and cited 4 Burr. 2271, that under special circumstances, a motion for a new trial might be made after the four days.

Mr. Sergeant, for the defendant, insisted that no point had been reserved by the Court on the trial, (and with this, the judges, who tried the cause agreed), and that it was indispensably necessary by the 34th rule regulating the practise of the Court, that notice in writing of the intended motion for a new trial should be given to the adverse party or his attorney, ten days at least before the term commences. He moved, therefore, that the motion for the new trial should be dismissed.

Per Curiam. The entertaining of the motion for a new trial in this cause would go in direct opposition to the printed orders of the Court. There can be no use whatever in making rules for the regulation of the practise of the Court unless we adhere to them. Nor do we apprehend there is any danger of injustice in the present instance.

Motion for the new trial dismissed.

RICHARD CATON, indorsee of DENNIS DE BEEDT, *vs.* WILLIAM M'CARTY.

Declaration filed though not marked *de bene esse*, is no waiver bail.

THIS cause had been removed from the Common Pleas of Philadelphia county by *habeas corpus*. Previous to the entry of bail, the plaintiff's attorney had filed his declaration, without marking the same *de bene esse*, and a question arose before the Court whether this was a waiver of bail.

Messrs. Ingersol and Levy, *pro def.*, contended that by the practise in England, such unconditional declaration would

amount to a waiver, and cited Highmore on Bail, 15, 57. Lib. Pract. Reg. 86. Atty. Pract. in B. R. 77. 1 Richardson's Pract. in C. B. 106.

Mr. Heatley, *pro quer.*, insisted that even by the English practise, it is no waiver, unless the copy of the declaration be delivered to the defendant, his attorney, or agent.

Per Curiam. We know of no such practise in Pennsylvania, nor do we see any good reason for it, even in England. We, individually, know that in all Courts wherein we have practised, the usage has been different from that contended for. Besides, if the English practise ought to be extended, why stop at the mere filing of the declaration? Why should not the copy be delivered to the defendant or his attorney? The practise of every Court is the law of that Court, and we must be governed by our own customs and usages, as the Courts at Westminster are governed by theirs. We are clearly of opinion, that the unconditional filing of the declaration in the present instance is no waiver of bail.

SAMUEL LEACH *vs.* CALEB ARMITAGE.

When a fact has been submitted to a jury, on a variety of evidence, Court will not grant a new trial, especially when there has been a view in ejectment.

On a motion for a new trial in this cause, the chief justice reported the evidence which was given at the trial, at the last assizes held for Montgomery county.

The suit was an action of trespass, for breaking and entering the close of the plaintiff, in Cheltenham township, containing fifteen acres. The defendant pleaded *liberum tenementum*, and the parties were at issue.

The plaintiff showed a title under a warrant granted to Toby Leach, dated 30th of 9th mo., 1682, for two hundred acres of land, and a survey thereon, returned into the surveyor general's office, on the 25th of 5th mo., 1684.

The defendant deduced his title under a warrant granted to Benjamin Whitehead, dated 27th of 6th mo., 1683, for two hundred and fifty acres, and a survey thereon, returned into the surveyor general's office, on the 3d of 7th mo., 1683. The survey for Leach was made prior to that for Whitehead, but the return into the office was posterior. The patent to Whitehead was dated 27th of 4th mo., 1684, and earlier than that to Leach.

It was given in evidence, that a trial was had between Samuel Leach (the now plaintiff), and Benjamin Armitage, (the father

of the now defendant, under whom he makes title), in an action of trespass in the Supreme Court in September term, 1755, when the plaintiff became nonsuit, on an investigation of his title to the lands now in question; but at that period he was said to have been in his minority. That at the same term, a trial was also had between Isaac Leach (the brother of the said plaintiff, and claiming under the same title), and the said Benjamin Armitage, in another action of trespass, when a special verdict took place, finding the facts as to the warrants, surveys, and returns, and the patents issued thereon, as before stated; whereupon the Court gave judgment for the defendant, upon argument, in September term, 1756; and that an ejectment had been brought by the now plaintiff for the lands in question, against the said Benjamin Armitage, which came on to be tried in April term, 1775, when another special verdict was found, stating the facts in the former special verdict; whereupon the plaintiff discontinued his suit on the 22d April, 1775.

On the late trial it was contended by the plaintiff, that the lands in controversy lying in Cheltenham township, could not have been included under Whitehead's warrant and survey, which were said to relate to lands in Bristol township, and that no actual survey had been made for him. The plaintiff undertook to show the boundaries of Bristol township, and brought forward maps and plats of survey and a variety of evidence from the records of the land office to prove his assertions. Some ancient witnesses were also produced for the same purpose, and likewise to prove where an old stone corner formerly stood, which was said to have been lately removed.

It was also made a question, in what particular spot the survey supposed to have been made for Whitehead, began. Arguments were urged by the counsel, *pro* and *con*, from the draught of Bristol street road and the lines of the adjacent surveys, to show that the 15 acres of land were included within the survey made for the said Whitehead.

The judges who tried the cause left it to the jury, who had previously viewed the premises, to determine on the whole of the evidence adduced to them, whether the survey made for the said Whitehead comprehended the lands in question; if they found that it did not so comprehend them, then the verdict to be for the plaintiff, but if otherwise, for the defendant. The jury without staying out long from the bar, found a verdict for the plaintiff, with six pence damages, and six pence costs.

Messrs Lewis and Wilcocks, for the defendant, insisted that

the verdict was against the general weight of the evidence, and against the substantial charge of the Court; that the merits of the plaintiff's claim had in fact received three different discussions many years ago, when it must be presumed the facts could be much better ascertained than at present. In the first, the plaintiff had become nonsuit; in the second, judgment had been rendered by the Court against his brother, holding under the same title, on a special verdict finding the material facts of both titles; and in the third, upon a like special verdict being found, the plaintiff thought proper to discontinue his suit, not choosing to risk the judgment of the Court. When two verdicts have passed the same way on a title to lands, chancery will grant a perpetual injunction. *Leighton vs. Leighton*, 1 Wms. 671. Though it had been laid down in the case of the *Earl of Bath vs. Sherwine*, Prec. in Cha. 261, that equity will not grant an injunction, even after five verdicts in ejectment, yet the authority of that decision had been considerably shaken by *Leighton's* case, and the animadversions of *Ld. C. B. Gilbert*, in his *Forum Romanum*, 195. They concluded that the present cause was worthy of re-examination, and that it was probable justice had not been done by the late verdict.

E contra. Messrs. Ingersol and Sergeant contended, that no argument could be deduced against the plaintiff, from his nonsuit in the first action of trespass, as it could not now be ascertained on what grounds and for what causes he had suffered it; and besides he was then a minor. The second suit was commenced by his brother, and he did not claim under him. In the third action, it was true, he had discontinued after a special verdict in ejectment, but it is highly probable, there would be no great difficulty at this day, upon the facts stated therein, that the plaintiff would be entitled to judgment. At that day, it might possibly have been the general idea, that no right under the late proprietaries, without a patent, amounted to a legal title, on which an ejectment could be supported. The general opinion now is very different, and on the best grounds. Though the patent to *Leach* was posterior to that granted to *Whitehead*, yet they must severally refer, as to their validity, to the respective dates of the warrants and actual surveys, whereon they were founded. The surveyor was the agent or servant of the proprietaries; the people had no control over him. His acts were binding on his constituents, and his laches in not returning a survey already made, or partiality in returning the survey on a later warrant, in preference to a former warrant, could not

abridge or defeat the title of the person claiming under the elder warrant, or enlarge the title under the younger warrant.

But if the defendant's counsel meant to extend the chancery practise to the present instance, it ought to be done throughout. Why was not the application made in time to the equity side of the Court? Why was there no motion made to stay proceedings in an early period of the cause, on the ground of the former verdicts, if such a motion could be sustained? By the defendant's acquiescence, he has lost the benefit of what he now sues for.

But admitting even, that the prior return of survey gave a better title to the original warrantee, the cause was taken up on new grounds on the late trial. The question submitted to the jury was, whether there was an *actual survey* made for Benjamin Whitehead, and whether this survey went over into Cheltenham township. The great bulk of the lands lay in Bristol township. The plaintiff brought forward very strong evidence to substantiate the point, that the survey under which the defendant claimed was confined to Bristol township alone. It was a mere question of fact, and a jury of the first character and reputation in the county, who had the full benefit of a view of the disputed premises, assisted by showers, decided upon the mere point of fact submitted to them. They did not run counter to the opinion of the Court. They judged for themselves upon the whole of the evidence, and must be conceived to have been considerably influenced by what they observed upon the view. The Court will not set aside a verdict, though the judge who tried the cause thought differently from the jury, unless they have been guilty of palpable injustice. Such were the opinions of Lord Chief Justices Lee and Pratt. 5 Bac. Abr. 245, 246. A verdict must be of a matter of considerable value, before a new trial is granted. 3 Blackst. Com. 392. Loft. 146, 147. Here there is a verdict for six pence damages only. In ejectments, new trials were not granted formerly, because not conclusive to the right; but they are now granted, because of the change of possession, which in many instances produces inconveniences. 4 Burr. 2224. The present suit is an action of trespass *vi et armis*. It is neither conclusive to the right, nor can any change of possession take place in pursuance of the verdict; and consequently is not within the reason why new trials are grantable in ejectment causes. If the case deserves re-examination, the defendant may, if he thinks proper, commence an ejectment, to try the title to the lands in controversy, and the parties will then meet on more equal terms than if the Court were to award a new trial, which only could be done on payment of costs.

Per Curiam. Upon the trial of the cause, it was submitted to the jury upon the great variety of evidence which was given to them on both sides, whether the actual survey made for Benjamin Whitehead included the lands in question. It was fairly left to them on this simple fact, which must necessarily influence their verdict. They must naturally be supposed to be more competent to the decision of such a question, having had the benefit of a view, than any other persons without that species of information. It is laid down in the books, that where there has been a view, the Court will not grant a new trial, without strong and special circumstances. (5 Bac. Abr. 240. 11 Mod. 1.)

The present verdict is not conclusive to the right, nor effects any change of the possession. If it be thought proper, the point of title may be tried again in a new action of trespass or ejectment. The damages found are small; and if the defendant was to obtain a new trial, it could only be effected on payment of costs. The Courts' setting aside the present verdict, would be throwing an unreasonable slur on the plaintiff's title, which if it should come before the Court again for discussion, ought to be tried on the fairest grounds.

We are therefore unanimously of opinion, that the rule to show cause why a new trial should not be granted, be discharged, and that judgment be entered for the plaintiff.

JOHN HEISTER *vs.* MICHAEL LYNCH.

On a feigned issue to try the validity of a will, the Court before whom it is tried, but not the register, has the power to award a new trial. The jurors are the constitutional judges of the credit of witnesses, and if the sanity of a testator is fairly left to them, the Court will not interpose, where they have discovered no leaning. No very great share of reason is necessary to validate a will.

AN issue had been directed by the register for the probate of wills and granting letters of administration, for the county of Montgomery, on the prayer of the parties, to try the validity of a certain writing dated 12th October, 1789, purporting to be the last will and testament of John Pawling, deceased.

It came on to be tried at the last assizes for Montgomery county, by a special jury, who gave a verdict establishing the will.

A motion was now made for a new trial.

It appeared on the trial that there were three subscribing witnesses to the will, Israel Jacobs, Esq. George Bowyer, and William Bowyer, the last of whom died before the day of Nisi Prius.

Mr. Jacobs was of unexceptionable character; he drew the will. He had doubts then respecting the sanity of the testator; who was at different times in a drowsy or lethargic state, and

appeared to want his recollection at those periods. When these occurred, he stopped and did not proceed, until he found him in a better state. He then proceeded to draw the will, finished it and subscribed it as a witness, and saw the other two witnesses subscribe it. Upon the whole, he affirmed at the trial that he did not apprehend him to be of sane memory when he made his will.

George Bowyer swore that he was well acquainted with the testator, and that he believed him to be fully possessed of his understanding when he executed his will.

Several witnesses were examined at the trial, to prove that on the days preceding, and subsequent to, the making of the will, and also on the very day of making thereof, the testator appeared not to possess his memory or recollection, and gave particular instances thereof. It was ascertained that on the day he made his will he did not know the amount of his personal property. By a former will of the 12th June, 1784, the testator had made an equal division of his property among his five children. By the will attempted to be proved, he gave the greater part of his estate to the children of Heister, the plaintiff. One Paul Custard swore, that shortly before the testator made his will, he heard him say he would divide his estate equally amongst his children, notwithstanding the persuasions of his family. He died ten days after the execution of the will in question.

On the other hand, it was proved by other witnesses, that the testator, some time before his death, was very infirm; that during his drowsy fits he was forgetful and flighty, but when roused up, he obtained his memory and recollection; that he made several calculations previous to the drawing of his will, extending to the minutiae of his property, and held several conversations with the witnesses, which showed that, though he was weak in body, he retained a competent share of understanding; and that his idea of making an equal division of his property among his children was, that his several grand-children should share the same equally (*per capita* and not *per stirpes*), according to his declarations sworn to by John Dull, which would be fully effected by establishing the will in question. And that the testator had repeatedly declared that Lynch, the defendant, having married his daughter without his consent, should not wed his pocket-book.

The defendant grounded the present motion for a new trial, on evidence found out since the trial. They read the depositions of several witnesses, showing that the aforesaid George Bowyer

was a man of bad character; that, at one time previous to the trial, he had said he could not tell whether the testator was in his senses or not when he made his will, and had repeatedly made use of malicious and disrespectful expressions against the defendant.

The plaintiff combatted this testimony with other depositions, establishing the character of the said George Bowyer as good; containing frequent declarations of his to different witnesses at divers periods, that the testator possessed his understanding when he executed his will, and also declarations of the aforesaid William Bowyer, the other subscribing witness, at divers other times, to the same effect.

Messrs. Randolph and J. B. M'Kean, for the defendant, contended that the verdict was against the weight of the evidence, as given at the trial. George Bowyer's declarations, previous to the trial, of his being unable to tell whether the testator was in his senses or not, had disarmed the defendant from bringing witnesses to attack his character. He was misled and deceived thereby.

It is in the discretion of the Court to grant new trials when verdicts are unjust, or even do not give general satisfaction. That power is now exercised with great latitude, and for the best reasons. 1 Burr. 391, 393. 3 Black. Com. 389 to 392,

One cannot make a will unless he has a sane and perfect memory to dispose of his property with understanding and reason. 6 Co. 23. An old man who is childish and forgetful cannot make a will. Swinb. pt. 2, sec. 5, pp. 82, 83 (ed. of 1743). Where the testator is of weak judgment, easy to be persuaded, and the legacy great, it is a ground to set aside the will. Ib. pt. 7, § 4, p. 478. If the testator do erroneously express a false cause for a legacy, the disposition is void, by the civil law. Ib. pt. 7, § 5, p. 482.

They likened this case to that of *Staw vs. Abbott*, 2 Vez. 552. There, a question arising as to the forgery of a certain paper, relative to the estate of Captain Girlington, Lord Chancellor Hardwicke sent it to a jury for trial. Judge Foster, who tried the issue, certified that he was well satisfied with the verdict. But though Lord Hardwicke admitted that new evidence discovered since the trial would not be sufficient, in a Court of Common Law, to set aside the verdict, because of the dangers consequent thereon, yet where his conscience was not satisfied as to the grounds and truth of the evidence upon which the verdict was given, he directed another trial on payment of costs.

This was said to be the ordinary rule of equity, where a matter of inheritance is in question, or in the case of a "personal demand of considerable value." *Ib.*, 554.

In the present instance, it appears by the inventory that 3,500*l.* is the object of contention, and if the Court should sanctify the verdict, it will, as personal property, be fully concluded thereby.

For the plaintiff, it was insisted by Messrs. Ingersol and Sergeant, that the weight of evidence was by no means against the verdict.

The judges on the trial discovered no inclination either way, but left the sanity of the testator as a mere point of fact to the jury.

It is highly dangerous for the Court to permit the credit of evidence to be impeached by subsequent evidence, which was in the party's power before. For the parties are supposed to come prepared to support or impeach the character of the witnesses on either side. 2 *Vez.*, 553. Said to be a settled rule, where the party by his own diligence could have procured such evidence. 5 *Bac. Abr.*, 250. If a witness, during a trial, give a wrong answer to a question, through mistake or misapprehension, he may correct himself at the time. 2 *Bac. Abr.*, 296. But even Courts of equity will not suffer a re-examination of a witness, or new testimony to be given after publication of the depositions, when it is seen where the cause pinches. The necessary consequence would be perjury. 1 *Vern.*, 47. It is true, in 2 *Black. Rep.*, 955, it is resolved that a receipt for the demand, found out after a trial, the attorney swearing he did not know of it before, was a ground for a new trial. It was a very special case, and manifest injustice would be otherwise done. But there is no general rule which will not admit of some exceptions.

In a late case it has been determined that an objection to the competency of witnesses, discovered after a trial, is not a sufficient ground, of itself, for granting a new trial, though it may have some weight with the Court, where the party applying has merits. 1 *Term Rep.* 717. [*Vid. Ib.*, 84, 85.]

The case before the Court cannot, with propriety, be compared to such cases as occur in a Court of equity, where the chancellor, to inform his conscience, sends an issue to be tried at law. There he will go on with the trial of issues, until his mind is fully satisfied, and, after all (as Lord King did in the cause referred to in 2 *Vez.*, 554), may give a decree founded on a fact contrariant to all the verdicts. In the present suit, the register is bound by the jury's verdict, as to the validation of the will,

provided this Court render judgment on it; though the controlling power of this Court to grant a trial is not denied, judging by the rules and precedents of the common law Courts.

The defendant, by the testimony discovered since the trial, is desirous of impeaching the reputation of George Bowyer; but the plaintiff contends that if both Mr. Jacobs and he gave testimony against the will, yet it might possibly be established. Bull. (4to. ed.) 260; 2 Stra., 1096; 4 Burr., 2224, 5. Mr. Jacobs was of opinion at the trial that the testator was not sane when he drew his will; but to suppose him to have thought so at the time of his attestation, would derogate from his character. Nor by law could he have been admissible to give evidence against his own attestation. 4 Burr., 2224. He formed his judgment, probably, afterwards, on subsequent circumstances, and the jury were equally warranted to make their own deductions from the whole of the evidence. Perhaps he judged from the alterations made in the will of 1784; but if the testator's idea was to give his grand-children an equal share of his property, this objection against the latter will is obviated, and civilians have differed not a little when relations shall take *per capita* and when *per stirpes*. 2 Bac. Abr., 429. Testator was the legislator of his own family, and could dispose of his property as he pleased it should go after his death. Every person is presumed to be of perfect mind and memory, unless the contrary be proved. Swinb., part 2, sec. 3, p. 77. And it is a hard and difficult point to prove a man not to have the use of his reason and understanding. Ib., 78. Two witnesses deposing *sans menti*, are preferred and believed to one hundred touching insanity. Hargr. Co. Litt., 246; *b* (in note).

It is said 3,500*l.* is at stake, but value alone is not a ground for granting a new trial. 2 Term Rep., 113, 120. No new trial will be granted, unless the evidence greatly preponderates; per Foster; 1 Burr., 396. Where there has been evidence on both sides, though the jury find a verdict contrary to the opinion of the judge, it is no ground to set it aside. 1 Wils., 22. So when there is a contrariety of evidence. 3 Wils., 47. In the case of Purviance et al. *vs.* Angus, in the High Court of Errors and Appeals, a new examination into the facts was refused, though applied for on the discovery of new evidence.

The jury are the sole judges of the credit of the witnesses. One subscribing witness has sworn to the insanity of the testator; one other is dead, but, as he attested the will, it is to be supposed he would have sworn to the same effect. And Mr. Jacobs, the remaining witness, in his testimony, must have combined the opinions of others with the fact he gives evidence of;

but the sanity of the testator was left at large upon all the evidence, to be judged of by the jury.

M'Kean, C. J. A Court of Equity will order a new trial on an issue directed to be tried at law, without setting aside the former verdict. It is merely for the satisfaction of the conscience of the chancellor. But I greatly doubt the power of the register in a case similar to the present, where an issue has been directed under the law, to try the validity of a will. Undoubtedly, however, the Court where the trial is, have a power over the verdict. George Bowyer has proved the due execution of the will, by the testator, in the possession of his understanding. William Bowyer, one other of the witnesses, is dead, but his subscription to the will is a very powerful presumption in its favor. One affirmative witness, by the rules of law, counter-weighs many in the negative. The sanity of the testator was submitted to the jury, upon all the evidence; there was a contrariety of evidence, but they were judges of the credibility of the witnesses. I think it highly probable, that a second jury would give the same verdict, even with the evidence lately discovered. I think, therefore, there are no grounds for us to award a new trial.

Shippen, J. The Court discovered at the trial no leaning in whose favor the verdict should go. The sanity of the testator was fairly left to the jury to be dispassionately judged of on the whole of the evidence adduced to them. They have validated the will on full consideration. One circumstance strikes me in the course of this business, on the testimony of Mr. Jacobs, from whose evidence the principal difficulty arises. He was sent for to draw the will; he stopped at different periods during the transaction, when he was doubtful of his understanding; but he went on with the will when he found the testator in a better state of mind. Unquestionably, he then concluded, in favor of his sanity. As to any conclusions he may have drawn since, the jury could form their judgment equally with himself. I am of opinion against a new trial.

Yeates, J. I concur. The sanity of the testator was submitted by the judges who tried the cause to the decision of the jury as a simple fact. The credibility of the witnesses falls within their more immediate and peculiar province; they are the constitutional judges of the fact. 3 Wils. 47. The difficulty which occurs from the testimony of Mr. Jacobs, has been already fully obviated by the remarks of Mr. Justice Shippen. Upon the trial,

Mr. Jacobs has most probably blended opinions formed on facts subsequent to his drawing the will, with the occurrences which arose previous thereto. George Bowyer swears expressly to the sound memory of the testator. A strong argument in favor of the will, arises from the subscription of William Bowyer, who is since dead. The presumption of law appears to be in support of the sanity of the testator, and it is a hard and difficult point to prove his want of understanding. I would also observe, that no very great share of reason is necessary to validate a will, where there is no fraud or imposition. The intended disposition of a man's property by this last solemn act, must in general be a subject frequently occurring to him, and his mind is most frequently made up at different periods, how his estate shall go after his death. It is seldom the thought of the moment, but the collected resolutions and determinations of a succession of years.

In common cases, unless upon the strongest grounds, and under the most special circumstances, I conceive it would be dangerous in the highest degree, to grant a new trial, on account of evidence discovered since the former verdict, which the party, with due diligence, might before have procured, and that the settled rule of law is so. 5 Bac. Abr. 250.

Upon the whole, I think the jury were the proper and constitutional judges of the fact; it does not appear to me that injustice has been done, and I am of opinion against a new trial, and that judgment be entered for the plaintiff.

Mr. Justice Bradford declined giving any opinion, having been concerned at the trial as counsel for the plaintiff.

HANNAH HOOD and WILLIAM M'MURTRIE, executors of JOHN HOOD, *vs.* JOHN MAXWELL NESBITT and DAVID HAYFIELD CONYNGHAM.

Every circumstance must be weighed, to form a judgment of the fraud or fairness which the whole transaction impresses on our minds.

THE plaintiffs declared on a policy of insurance, subscribed by the defendants, on the ship *American*, whereof William Keeler was master, on her voyage from Philadelphia to Fayal, at Fayal, and thence back again. The sum of 100*l.* was underwrote on the vessel, on the 5th December, 1785, at a premium of seven and a half per cent. The cause had been tried at the last sittings, on the 15th November last, and the jury found a special verdict to the following effect:—

“The defendants underwrote the policy on the ship as stated in the declaration. The ship arrived at Fayal on the 28d December,

1785, and three weeks afterwards, on the suggestion of Duncan Ross, and at the request of Captain Barnes, Captain Keeler sailed in pursuit of the sloop Fly, which had been run away with by her mariners, under a contract to receive 100*l.* sterling in case of the recapture of the sloop, and returned to Fayal in eight days after sailing. Captain Keeler did not thereby intend an *exclusive profit for himself, but sailed for the joint benefit of his owners and himself*. The ship was afterwards wrecked on the Island of Fayal, on the 31st January, 1786, by a storm, If the law be with the plaintiffs, then the jury find against the defendants 129*l.* 6*s.* 2*d.* damages; but if it be with the defendants, then the jury find for them."

This special verdict was argued this term by Messrs. Lewis and Sergeant, for the plaintiffs, and by Messrs. Ingersol and Wilcocks, for the defendants.

Two points were made on the argument on the part of the plaintiffs: 1st, That here there was not sufficient matter found by the jury on which the Court could render judgment, and therefore that a *venire facias de novo* must issue. 2d, That the facts as found amounted to barratry on the part of the captain.

On the first head, it was said by the plaintiffs, that whether it was a mere deviation or not on the part of the master, was a question of fact to be determined on the circumstances of the case. Parke on Marine Insur. 362. If the matter in issue be not expressly found, the verdict is bad. 5 Bac. Abr. 315. Where the matter in issue is whether a thing be fraudulent or not, the Court will never determine whether a matter is fraud or not, however strong the circumstances of fraud are which are found by the jury. Crisp *vs.* Pratt, Oro. Car. 550. The Court will not adjudge a matter to be fraud, though the jury may. 13 Vin. Abr. 554. L. a. § 3. Vent. 159. 10 Co. 56, *b.* It is evidence to the jury, and not any matter on which the Court can judge. The present case was compared to an action of trover, wherein request and denial is evidence of a conversion to the jury, on which they may judge, but the Court cannot. Gilb. Law Evid. 258. Miles *vs.* Solebay, 2 Mod. 244. So in a criminal case, where the consequence of a verdict may be corporal punishment, unless the defendant is found guilty, Court will never infer from any evidence or circumstance found by the jury that he is guilty. Rex *vs.* Plummer, 12 Mod. 628. They also cited Smith *vs.* Foaves, Noy, 147, 2 Rol. Abr. 693. S. pl. 1 pl. 2. Ib. 695, pl. 6.

To this it was answered by the defendants, that strict form is not now required in verdicts; where they are substantially good, the Court will mould them into form. *Dall.* 462. Motion for a new trial, what circumstances amount to *covin*, is always a question of law. *1 Burr.* 396, 397. Whether the execution of a deed be an act of bankruptcy or not, whether a matter be fair or fraudulent, is often a question of law. Per Lord Mansfield, *1 Burr.* 474. In this case the conveyance, though by way of security, and for valuable consideration, was determined to be fraudulent, and an act of bankruptcy.

Suit on a policy of insurance: Jury found a verdict for the plaintiff, subject to the Court's opinion on the statement of a great variety of facts. The Court adjudged the conduct of the captain not to be *brrratry*; they undertake to say, whether from the circumstances it was fraudulent, and if so, whether it was *barratry*, not being against the owner or freighter of the vessel. *1 Term Rep.* 323.

Special verdict finding all the circumstances of a quarrel and homicide: The Court determined the killing on the whole facts to be murder. *Rex vs. Oneby*, *2 Stra.* 766.

The defendants insisted that here the deviation was expressly found which would excuse them.

On the second head it was said by the plaintiffs, that the special verdict is silent as to the real views of the captain. Whether his sailing in pursuit of the sloop was or was not for the mere sake of the reward of 100*l.* sterling, is not found. If the master can, by joining the owner in a supposed benefit, sink his own conduct into a simple deviation, it will be an effectual cover to him in all cases, and will put every owner fully into the power of his captain. If he could make an agreement, under pretense of procuring his owner a moiety of a promised reward, he may equally do it as to one-hundredth part, and secure the residue for himself. *Barratry* is every species of fraud or knavery in the master, tending to injure the owners or freighters. *Parke*, 94. As where to defraud the owners, he deviates from the intended voyage. *Ib.* 93. *1 Postlethw.* 136. So sailing out of port without paying the duties, whereby the ship was subjected to forfeiture, has been held to be *barratry*. *1 Stra.* 581. Where a suit was brought on a policy "at and from M. to L. against the *barratry* of the master (amongst other things) and all other dangers, damages, and misfortunes which should happen to the prejudice and damage of the ship" — the breach assigned in the declaration, was the loss of the ship by the fraud and negligence of the master, and it was held to be sufficient

both in C. B. and B. R. For barratry imports fraud, and he that commits a fraud may properly be said to be guilty of a neglect, viz.: of his duty. Parke, 95, 96; 2 Lord Raym., 1949; 1 Stra., 581. Where a master is to have *no* benefit to himself, by passing by the intended port, it is no barratry (Parke, 97); and, therefore, it may be concluded where he is to have *any* benefit, it is barratry.

The plaintiffs insisted that the jury had found the policy and the loss, and, if no sufficient excuse was found, judgment must be entered for the plaintiffs. And it was said that no such sufficient excuse was found; because: 1st, the verdict does not find that the cruise was made with the knowledge or privity of the owners or consignees; and, secondly, there was a benefit intended by the master for himself.

To this it was answered that barratry, by the English law, means a *cheat*, a *fraud*, a *cozening*, or *trick*, by the master or mariners of a ship against the owners or freighters. Parke, 93; Cowp., 154; 1 Postlethw. Dictionary, 136, 214. It must be of a criminal nature, or a gross negligence, tending to the benefit of the master or mariners, and to the injury of the owners, and without their privity or consent. Parke, 94. When the master acts for the benefit of his owners, it is no barratry, though it may be a deviation or breach of contract. To make it barratry it must be something of a criminal nature, as well as breach of contract. *Ib.* 96, 97, 101; 2 Stra., 1173. If the conduct of the master arises from error in judgment, without any evil design, it is no barratry. Such is the present case, where, from humane views, and to secure mariners who had run away with the sloop, and to save the property, the master sailed in quest of the pirates, having the interest of his owners in view. When the master is acting for the benefit of himself, and *no* good is intended for his owners, it is barratry. Per Aston, J., Parke, 102. It consists in setting his private interests fraudulently, in direct opposition to those of his owners.

Here is a sufficient excuse found for the underwriters. A deviation by the captain, without necessity or reasonable cause, from the course of the specific voyage insured, discharges them from any responsibility. It was an implied condition to be performed on the part of the insured, that the ship should pursue the most direct course of which the nature of things would admit, to arrive at the destined port. The voyage being changed, becomes a different voyage, and not that against which the insurers have undertaken to indemnify. Nor is it at all material

whether the loss be or be not an actual consequence of the deviation ; for the insurers are in no case answerable for a subsequent loss, in whatsoever place it happen, or to whatever cause it may be attributed. Parke, 335, 336.

M^r Kean, C. J. On the special verdict found, two questions arise: first, whether sufficient facts are found by the jury on which the Court can render judgment; and, secondly, if so, whether, on these facts, the conduct of captain Keeler, master of the ship *American*, amounted to barratry, or deviation only. If the latter, the underwriters will be excused from the policy.

We apprehend the facts found to be sufficient for the Court to render judgment. Enough is set forth to determine our opinion. The jury need not ascertain precisely by name that it was either deviation or barratry. The Court, from the circumstances of the fact found, can judge whether it amounts to barratry or deviation only. As to this, the case in 1 Term Rep., 323, is full in point.

We are also unanimously of opinion that the facts found amount to a deviation only. It is an essential ingredient in barratry that there be a criminal act or intent, or gross negligence on the part of the master or mariners, tending to their own benefit, and to the injury of the owners or freighters of the ship, and without their privity or consent. The jury have found that captain Keeler did not intend any exclusive profit for himself, but sailed on the cruise for the benefit of his owners and himself, in quest of the sloop *Fly*, which had been piratically stolen away by her seamen. His conduct may have been imprudent; but, in our idea, partakes more of humanity than criminality.

But the deviation being fully found, it discharges the underwriters from any responsibility, and, therefore, judgment must be entered for the defendants.

Justice Bradford. As this is a mercantile question, which divided a very respectable jury, I think it right to state the reasons of my opinion pretty much at large.

The special verdict states a voluntary departure from the due course of the voyage without any necessary or just cause. This will, therefore, discharge the policy, unless the circumstances attending it prove it to be (as the plaintiffs contend it is) an act of barratry.

Before I take notice of these circumstances, it will be proper to ascertain what it is meant by barratry. It has been often defined, and its general meaning seems now as well fixed as that of

any term known in the law. From comparing these definitions, it appears that the terms "villainy, knavery, cheat, malversation, trick, deceit, or fraud of the master" are used as synonymous with it. The adjudged cases from that of *Knight vs. Cambridge* (2 Lord Raym. 1349), in 1724, down to that of *Nutt vs. Bourdieu* (1 Term Rep. 323), in 1786, speak the same language. There is no case of barratry in which we may not perceive some fraud or criminal conduct in the master.

Sailing out of port without payment of duties is not an exception. This is said to be neglect, but it is more; it is evidently a fraudulent and criminal act exposing a ship to forfeiture, for the dishonest purpose of putting money in his own pocket (Cowp. 152).

It may be sometimes difficult to distinguish the lower species of fraud from the higher degrees of mere misconduct. But one thing is clear; if the facts are not strong enough to import some fraud or criminal conduct in the master, whatever name we may give to his conduct, we cannot call it barratry.

The question then is, "Do the facts found by the special verdict fix any fraud or criminal conduct on Captain Keeler?" If they do, it must be either, because the departure was without his owners' knowledge, or because it was made with a view to his own private benefit. It was not much urged at the bar, that every deviation without orders amounted to barratry; yet as this was the very point upon which I have reason to think the jury divided in opinion, I will notice it.

It is true, that in many of the commercial cities in Europe, a deviation without the owners' consent will not discharge the insurers. It is so established in France (2 Magens, 174) Amsterdam (Ib.), Middleburg (Ib. 73), and Rotterdam (Ib. 92). But this is the operation of positive ordinances. No such regulation is known among us. On the contrary, Lord Mansfield lays down the rule in 1 Burr. 347, in these words: "If the voyage is altered or the chance varied by the fault of the insured, *or of the master*, the owner ceases to be liable." Parke, pa. 336, is clear, that it makes no difference whether the insured were or were not consenting to the deviation. If the term *insured* is thought equivocal, *Weaket* is more express, and in pa. 165, says, it makes no difference whether the *owner of the ship* or the proprietor of the goods were or were not privy to the deviation. In *Elton vs. Brogden* (2 Stra. 1264) the deviation was against the express and positive orders of the owners, yet it was not barratry. Cases might be multiplied, but the point will not bear further comment.

But the *master's intention* was relied on by both parties. It

was admitted, that if the master had deviated with a view to his private advantage alone, and without intending any benefit to his owners, it would have been barratry. The law is so, and the reason is plain: such conduct imports *fraud* on the face of it. It is a cheat upon the owners, and secretly putting into his pocket what belongs to them. On the other hand it was agreed that if the departure had been for the exclusive benefit of his owners, it would not have been barratry. And why not? Because it is impossible to impute fraud to such disinterested conduct.

The case before us, is a middle case, between the two I have mentioned. "The master did intend the profit he might have gained, should be for the benefit of himself and his owners;" and while the defendants urge that his attention to his owner's benefit, renders it a mere deviation, the plaintiffs contend, that the private views poison the whole transaction, and make it barratry. Inconveniences appear to result from either construction, and I think it would be mischievous to give the captain's conduct *from this circumstance alone*, a definite name.

It does not of *itself* sufficiently import either fraud or fairness to acquit or condemn the transaction. Cases may be put where an attention to his own interest will not be inconsistent with the general purity of the master's views; or where, while he unites a small interest of his owners with a greater one of his own, we may discover a dishonest heart regardless of their essential interests. In all cases therefore of this kind, we must weigh every circumstance, and form our judgment from the impression of fraud or fairness, which the whole transaction makes on our minds.

Taking into view the whole conduct of Keeler, I cannot discover any fraud or criminal conduct. Here was an act of piracy committed in open day; the pursuit of the *Fly* was *in itself*, a meritorious action; and if Keeler had been the owner of the *American*, he would have been applauded for it. The whole mercantile world seems interested in the suppression of such villainy. He is solicited to employ his vessel on this occasion; he stipulates for a compensation, and though he expected to receive a part of it, yet that must have depended on the pleasure of his owners. It would have been their money earned by their ship, yet the captain might honestly expect that they would approve his conduct and award his exertions. It was a sudden thing; we cannot say that he knew of this insurance, or that he was aware of the consequences of his deviation. Here are no marks of knavery, or even of a disregard to his owners' interest. It was an imprudence, and he is

answerable for it to his owners; but the insurers are discharged.

For these reasons I concur with the rest of the Court, that judgment must be for the defendants.

APRIL TERM, 1792.

PRESENT — M'KEAN, CHIEF JUSTICE, — SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

JAMES HALDANE, and ELIZABETH, his wife (for the use of JOHN DUFFIELD), *vs.* MIERS FISHER AND JOSEPH SWIFT, executors of JACOB DUCHE.

After a recovery in ejectment against the tenants, and the death of their landlord, *indebitatus assumpsit* will lie against his executors to recover the rent and profits received from the time the plaintiff's title accrued, unless the testator had *no notice* of the title, or held under a *title* in which he was mistaken, or there had been *laches* in the plaintiff. Such action could not be supported at common law, but arises here from the necessary assumption of the powers of a Court of equity, grounded on their *maxima*.

MOTION for a new trial. The action was *indebitatus assumpsit* for 1,500*l.* received, to the use of the plaintiffs. Plea *non assumpsit* and issue. The cause came on to trial, January term 1791, when a verdict passed for the plaintiffs for 598*l.* 15*s.* The motion for a new trial was made on the part of the defendants in consequence of a declaration of the judges at the trial, that the defendant's counsel should be permitted to show, that upon the evidence given, the action was not sustainable, and if the Court should be of that opinion, a new trial should be granted.

On the trial the evidence given for the plaintiffs, as reported by the chief justice, was as follows, in substance. Jacob Duche, the testator, was seized in right of his wife, Hester, of a rent charge of 12*l.* 8*s.* 4*d.* per annum, issuing out of a house and lot in the city of Philadelphia, and was in like manner seized of another house and lot in the said city, and of a parcel of meadow containing five and three-quarter acres, situate in Moyamensing township, in the county of Philadelphia. Hester, the wife, died 23d July, 1779, without issue; Elizabeth Haldane, one of the plaintiffs, was her heir at law. The plaintiffs were not apprised of their title to the premises until the year 1785, and on the 2d March, 1786, they, for a valuable consideration, sold, and by deed, conveyed the whole of the premises to John Duffield, who commenced an ejectment against the tenants in possession, and re-

covered. The said Jacob Duche Hester, his wife, and prior to their marriage, viz: on the 30th May, 1747, had entered into marriage articles whereby a power was reserved to her, during the coverture, to dispose of her personal estate, but no mention was made of her real estate. On the 11th of May, 1765, Hester, the wife, made an appointment, in nature, of a will, and thereby disposed of 2,100*l.* of the personal estate, of which 50*l.* were given to Elizabeth Haldane, who received the money from the said Jacob Duche. She also undertook to devise her real estate to her husband for life, and after his death, to his son, the Reverend Jacob Duche, jr., in fee, and constituted her said husband one of her executors. After the death of the said Hester, her husband continued to demise the real estate and to receive the rents, and also the rent charge until after the 2d March, 1786, to the amount of 938*l.* 5*s.* 3*d.*, of which he received himself 743*l.* 5*s.* 3*d.*, and Andrew Doz, one of his executors, received, after the deed to John Duffield, and after the death of Jacob Duche, the testator, 195*l.* A letter from the testator, dated 12th February, 1782, was written to Elizabeth Haldane, stating that as his son had been attainted of treason, the real estate of Hester Duche might be lost, unless she, as heir at law, would convey the same to him, and offering her 100*l.* to do so. By another letter, dated 10th May, 1784, and a third, dated 24th July, 1784, she was offered 300*l.* for a conveyance. Elizabeth Haldane then resided in the state of Maryland, and her husband was in straitened circumstances.

The marriage articles between Jacob Duche and Hester, his wife, were recorded on the 12th August, 1779, twenty days after the death of the said Hester.

The case was argued last January term, by Messrs. Lewis and Tilghman, for the defendants, and by Messrs. Ingersol and Sergeant, for the plaintiffs.

The defendant's counsel admitted that the plaintiffs were entitled to recover the amount of the rent-charge from 1779 to 1786, but insisted that they had no right to the rents and profits of the house and meadow ground.

They contended that there could be no such recovery at law, nor even in equity.

As to the first point, Duche, the testator, held under an apprehension of right the premises in question, and he being a tort-feasor, could not be recovered against in this way. The proper remedy was by ejectment and a recovery of mesne profits. No action of account lies on a wrong done, where there

is a disseisin, there is no privity. 3 Leon. 24. Owen 35, 83, 84. S. C.

There can be no trial of the title to lands under a suit for money had and received. *Nil habuit in tenementis* is no plea to an avowry for rent for enjoyment of land under a parol demise, under the statute of 11 Geo. 2 c. 19. 2 Wils. 208. Nor in assumpsit for the use and occupation of lands. Ib. 212, 213. *Aliter* in debt or covenant for rent on a lease (not by deed indented). Ib. 217. Action for money had and received lies not to recover back money paid for the release of cattle damage-feasant, though the distress were wrongful, on principles of private justice and public convenience, by reason of the difficulties which would be thrown on the adverse party. Cowp. 417, 418, 419. Nor does it lie against a revenue officer, to recover for an over-payment of duties, on account of the great inconveniences which would arise from such a doctrine. Cowp. 66, 69. The action for use and occupation is always grounded on a contract express or implied. 2 Wils. 115. The difference between these suits, and actions of trespass for mesne profits, is therefore sufficiently obvious. Trespass is a complete remedy, appropriated for this purpose by law. 3 Blackst. Com. 205. Though great liberality is used, in suits for money had and received, those suits have their restrictions, Great inconveniences would otherwise arise. Such actions may come on to trial in the most distant parts of the state, or even in Europe. Should you go into the titles of lands in such suits, they may be found to depend on forged deeds or wills; the testimony of ancient witnesses may be necessary; proofs of pedigree may be required, &c. To obviate these mischiefs, and all the evils arising from surprise, the policy of the law requires that these actions should be local, wherein such inquiries may become necessary.

As to the second point, the defendants' counsel insisted, that by the practise in chancery, one would be entitled to a decree for rents and profits in four instances alone:—

1. On a bill brought by an infant against a person entering on his estate; because in such case he would be considered as his guardian until fourteen, and his bailiff afterwards.

2. When dower or other legal estate is clear, but the lands or boundaries cannot be ascertained.

3. Where there is a trust or mere equitable title.

4. When there has been fraudulent conduct and concealment by the party holding possession against the rightful owner.

Under one or other of these heads may all the cases in the books of equity be classed, as 2 Cha. Rep. 259, 261. S. C. 2

Cha. Cas. 71, 134. 1 Cha. Cas. 126. 1 Vern. 296. 2 Wma. 645. 1 Vez. 172. Prec. in Cha. 517. Ib. 453. S. C. 2 Vern. 724. Prec. in Cha. 252. 1 Bac. Abr. 18. 3 Atky. 124.

Here was no fraud on the part of the testator. He records the marriage articles within twenty days after his wife's death. This was full notice to all the world, equally as judgment in a Court of Common Pleas are deemed notice to executors. He proves his wife's will, though by suppressing it, and the articles, he might have entitled himself to all her personal estate as her administrator. The plaintiffs might, by due diligence, have fully informed themselves of their title; their laches must be imputed only to themselves. One who sleeps on his title several years, before he makes entry, shall not turn his suit at law for mesne profits into a bill in equity, unless there be fraud or infancy in the case. Prec. in Cha. 516.

There can be no right to rents and profits, without some act done to show possession, either at law or in equity. 1 Vez. 233. As trespass will not lie at law for mesne profits, till possession is recovered, so neither till then can a bill be brought for an account of them. 1 Atky. 525, 526. Possession in the present instance recovered by Duffield, the alienee, is not tantamount to a recovery by the plaintiffs.

One depriving himself of his remedy by his own act, shall not have relief in chancery, as the lord of a manor, entitled to rent and fines, selling the manor in fee to another. 4 Vin. Chancery, 388, pl. 1. If lessor enters on his lessee, and suspends his rent, he shall have no remedy in equity. Ib. 389, pl. 5. Latch, 149; Noy, 82. Bishop of Exon refusing to receive rent, no relief in law or equity for the arrears. 2 Cha. Rep. 61. Plaintiff suspending his rent by his own act, there is no reason but that the defendant should retain it. 18 Vin. Rent, 563, pl. 4. Toth. 267. So a bankrupt, not pleading his certificate at law to a debt precedent to his bankruptcy, is not to be relieved in equity. 2 Vern. 696. So on a judgment had by default against executors, assets are admitted, and equity will not relieve. So on a judgment against tenant in tail, and *scire facias* against the heir, if he does not plead the estate tail, he is bound.

Here the substantial equity was with the testator. The intention of his wife was to vest him with her real estate during his life, remainder to his son. It is true she was mistaken in the means, and her will cannot by law pass her real property, no power being reserved in her for this purpose. But has ever equity, in a single instance, afforded relief against the plain intention of the parties? Where justice and good conscience are not the basis of a bill praying relief, will not chancery deny it?

If the testator could have procured a release from the plaintiffs, for the most trifling consideration, where would have been the inequity? The plaintiff's claim was founded on a legal advantage against the manifest will of Mrs. Duche. It is hard in the extreme, when a treaty was set on foot to purchase their right, and when new offers were made, for a stranger to step in and buy the property at one-fourth of its value. The maxim, that "he who seeks equity, must do equity," applies with peculiar force to the case of Duffield, the purchaser.

On the part of the plaintiffs it was answered, on the first point, that the present suit was sustainable at law.

Where one receives rents without title, a recovery may be had against him by the rightful owner, and the party may waive the *tort*. 1 Salk. 28. (Vide 1 Vin. Assumpsit, 270, where the reason given is, that he acted as the plaintiff's agent, if not as her husband. S. C. 11 Mod. 146. 12 Mod. 324. Holt, 36.) An action for use and occupation may be maintained by grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands from the time of notice by the grantee, and down to the day of demise in the ejectment, but not afterwards. 1 Term Rep. 378. *Indebitatus assumpsit* will lie for rent received by one who pretends a title. 2 Mod. 263. Cites 4 H. 7, 6, b. Moore, 458. This case is expressly in point. Duche, the testator, must be considered as the trustee of Mrs. Haldane, the heir-at-law.

On the second point there can be no difficulty. This Court has always adopted the equity principles, where it could be done on equal terms to prevent a failure of justice. Dall. 210. The testator received a considerable sum beyond the 2100*l*. devised by his wife's will, part of her personal estate, and a great part of her legacies, he discharged in depreciated paper currency, at the rate of 30 for 1. Where is his substantial equity? Was he in these instances scrupulously tenacious of adhering to the last will of his wife? A suit for money had and received, is a bill in equity, and in such actions a recovery should be had, when under the circumstances of the whole case it would be unconscionable for the defendant to retain the money. The testator here knew he had no title, and that he was receiving the rents for Mrs. Haldane.

Chancery has considerably extended the remedy of the real owners of lands, and the person that took the mesne profits by wrong, has been taken as trustee of, and accountant to, him who

had the right, founded in equity and good conscience. 1 Bac. Abr. 18. The same principle is recognized, particularly where the adverse party has the title deeds in his possession. 2 Wms. 644. In the case before the Court it must necessarily be presumed, that Duche obtained the possession of the documents respecting the real estate, on his intermarriage..

So where fraud is made use of, or the person having title is under a mistake, as in the case of two daughters having the same name. Prec. in Cha. 517. The letters of Duche, the testator, read on the trial, were calculated to keep Mrs. Haldane in an error, and were full of concealment. They were equally liable to the exception of "*suggestio veri et alligatio falsi*." The plaintiffs lived remote from the proper place of inquiry — in another state. Duche held up to their view the forfeiture of their ancestor's real property, by the attainder of his son, though he well knew, and was advised, that his son could claim nothing in consequence of the will.

No surprise can be pretended in the present suit. The defendants came fully prepared to answer the matters in question. Haldanes, the plaintiffs, have transferred all their right to Duffield, the purchaser. He run his risk in buying, and if he is eventually possessed of a good bargain, he is fully entitled to every benefit arising from it.

They also cited Cowp. 376. Though the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, yet for the benefit arising to his testator for the value or sale of the trees, he shall. *Indebitatus assumpsit* for money had and received by his testator will lie against an executor, though trover will not for the conversion of his testator.

The Court took time to advise, and this term judgment was given for the plaintiffs.

The chief justice stated very minutely and particularly the evidence given at the trial, and then said as follows:—

The counsel for the defendants insist, that upon this evidence the present action cannot be maintained, because the testator was a *disseisor*, and that no action at law or in equity will, in such case, lie against *executors*, nor where there is no *privity*, nor where one receives money as *owner*, and especially after the plaintiffs have conveyed away their estate to John Duffield. That the testator received this money from his *own* tenants, and for his *own* use, and that there was no fraud, concealment, or misrepresentation, or infancy in the case.

In support of these positions the counsel cited many cases in the law books, which I shall barely enumerate; viz: 3 Leon. 24; Owen 35, 83; 2 Wils. 115, 208, 213, 217; 2 Wms. 645; 3 Atky. 124, 130; 2 Cha. Rep. 61, 259; 2 Cha. Cas. 71, 134; 1 Cha. Cas. 126; 1 Vern. 296; Prec. in Cha. 517; 1 Vez. 170; 4 Vin. 388 pl. 1, 389 pl. 5; 18 Vjn. 563 pl. 4; 2 Vern. 696, and 8 Blackst. Com. 205.

The counsel for the plaintiffs in answer, urged, that an action of *indebitatus assumpsit* will lie against one who pretends a title to lands and receives the rents, by the true owner; for account will lie against him, and the one may be brought as well as the other; that it will lie for the profits received prior to the demise laid in an ejectment, and that he who receives rents by wrong, shall be construed a trustee or bailiff to him who has the right; that the plaintiffs may consider the testator as a disseisor or not, at their election — they may waive the *tort* and proceed on the implied contract that Duche, the testator, had no right in law or equity to receive this money, and therefore is not entitled *ex æquo et bono* to retain it, and that there was not only a concealment but a misrepresentation of the plaintiffs' title, by the testator. They concluded, that if an action at law for these moneys could not be sustained in England, yet they might certainly be recovered in a Court of Equity; and if they cannot be recovered in this action, there would be a right without a remedy; for no other remedy can be had in Pennsylvania. For authority they cited 1 Salk. 28; 1 Vin. Abr. 270; 1 Term Rep. 378; 2 Wms. 644; Prec. in Cha. 517; 1 Bac. Abr. 18; Cowp. 376.

This does not appear to be a hard or difficult case. If a man receives my rent, it is at my election to charge him with a disseisin, by bringing an assize or other action, or to have an account. Cro. Car. 303; Lit. Sect. 588. But if trespass is brought, and the disseisor dies, it cannot be renewed against his executors, at law; but it may, notwithstanding that *actio personalis moritur cum persona*, be recovered in equity. It does not seem necessary to determine whether such an action as the present could be maintained in England. The question here is, whether the plaintiffs are entitled in equity to an account of the rents and profits of Mrs. Haldane's estate, and if so, for what time?

Nothing can be clearer, than that the plaintiffs had a right to the real estate of Mrs. Duche, in July 1779, and to all the rents and profits to be derived from it from that time. It is certain, that they had this right in law, equity, and conscience; and if they are prevented from recovering them, it must be owing to

some impediment in law or equity. I know no such impediment. They have a right to receive this money from the time their title accrued, unless the testator had *no notice* of their title, or was in possession under a *title*, or such a title as he was *mistaken in*, or there has been a *default or laches* in the plaintiffs, in not asserting their title sooner.

Mr. Duche had all the deeds; he of course knew the title of Mrs. Haldane, but he might possibly have apprehended that the *devise* of his wife was good in law to himself. I say, he *possibly* was under a mistake for a time; but from his letter of 12th February, 1782, it appears that he then knew his own title to be bad and that of the plaintiffs to be good. It further appeared to the jury that he not only *concealed* the title of the plaintiffs from them, but *misrepresented* his own. From this time he was not a *bona fide* possessor, and was accountable to the plaintiffs for the rents, whatever might have been the case prior to this time. A man cannot be a faithful honest possessor of what belongs to others. Nothing but ignorance of the facts and circumstances relating to his own and adversary's titles, can excuse him in *foro conscientia*. This cannot be pretended here. Thus it was summed up to the jury on the trial, and they found for the plaintiffs accordingly; that is, the amount of the rents from 12th February 1782, till 2d March 1786, which I think was right and agreeable to equity and the truth of the case. If I erred in the charge to the jury, it was in limiting them to February 1782, and not going back to July 1779, the time Mrs. Haldane's title accrued. From this circumstance, the defendants retain the rents and profits of an estate for upwards of two years and a half, to which their testator had neither a legal nor equitable title. The cases cited for the plaintiffs, particularly 1 Bac. Abr. 18; Prec, in Cha. 517, and 2 Wms. 644, support this opinion.

The rule to show cause why a new trial should not be granted, must be discharged.

Shippen J. concurred.

Yeates J.* This is a motion for a new trial, and is brought forward by the defendants, grounded on the idea that the plaintiffs were not entitled to recover in this form of action, the rents of the house and lands whereof Mrs. Hester Duche died seized, from the time that Jacob Duche, the elder, had knowledge of the title of the plaintiffs (which in all probability was

* This opinion, though prepared, was not publicly delivered in Court.

on the 12th February, 1782), until the day of the demise, laid in the declaration in ejectment, on which the recovery of the premises was had, viz.: 2d March, 1786.

The argument has been conducted on two points: 1st, whether the suit could be sustained in a Court of Common Law in England; 2d, whether a Court of Equity would not give relief in such a case.

On the first head, the plaintiffs rely on the cases *Hasser vs. Wallis* (1 Salk., 28); *Birch vs. Wright* (1 Term Rep., 378), and *Arris vs. Stukeley* (2 Mod., 263).

But, in the first case, the defendant received the rents as the visible husband of the plaintiff, he having married her during the life of his first wife, and the plaintiff consented, on her marriage, that he should manage her estate, and, therefore, it may with propriety be said that the defendant received the money, acting as her agent, if not as her husband *de jure*.

In the case of *Birch vs. Wright*, there was a privity of estate, as well as contract, and the defendant came into possession as tenant of Mr. Bowes, from year to year, and held over his term. The plaintiff derived his title under Mr. Bowes.

In the case of *Arris vs. Stukeley*, the point directly before the Court for their opinion, was whether *indebitatus assumpsit* would lie against the defendant for the profits of an office when there was no contract between the parties, and where the defendant pretended title thereto. The Court held that the action would lie. This was determined, Trin., 29, Car., 2, in the exchequer.

In the case of *Howard vs. Wood*, adjudged Hil., 31 and 32, Car., 2 (and reported in Sir Thomas Jones, 126, and 2 Leo., 245), the same point came before the Court, and the objection was taken that the defendant claimed title and received the money for his own use; but the Court said if this had been a *new* case, it would be *hard* to maintain it, but it had been determined two or three times before, and the above determination in Dr. Arris's case is cited in 2 Jon., 128, where it is also said by the Court that if the case had now *first* come in judgment, they would not *allow* the action. The ground of the resolution is put on the foot of practise, and to preserve uniformity of decisions.

The *obiter* resolution in 2 Mod., 263, that *indeb. ass.* will lie for rent received by one who pretends a title, because in such case action of account would lie, is not warranted by the authority cited from Moore, 458. The words of 4 Hen., 7th 6 b. are general. "Per Brian. If I have lands, and a man receives my rents, and without my assent, yet he is receiver, &c., and there-

fore the receipt charges him, &c." On the contrary, as far as I have been able to discover, on a minute search, the cases are directly otherwise. In the year book, 2 Hen., 4th 12 b., Hankford, J., says: "I apprehend no man shall be bound to account, except by act of law, or his own account. By act of law, as guardian in socage, whom the law compels to account; by his own act, where he is, by his own proper will, bailiff or receiver. But here to make a man to account, where it never was his will to account, this would be a marvellous thing." So are the cases expressly in Brooke's Abridgement, tit. Account, pl. 8, 22, 24, 65, 89; that a receiver by wrong is not chargeable in account, and the case of *Tottenham vs. Beddingfield*, reported in 3 Leon., 24, and Owen, 85, 83, cited on the argument. The distinction is taken between the case of the king and that of a private person, where rents are wrongfully received, in 11 Co., 90. For these reasons, my mind is perfectly satisfied that, judging as a mere Court of Common Law, his action could not be supported.

The remaining question is, whether equity would give relief to the plaintiffs in a case similar to the present.

It is agreed by the defendant's counsel that chancery would decree an account of rents and profits where there has been fraudulent conduct and concealment by the party holding possession against the rightful owner. The plaintiff's counsel contend that their suit is maintainable on this ground, and that the letters of the testator were calculated to keep the defendants under an error, and that the communications were not fairly made; I mean those dated 12th February, 1782, 10th May, 1784, and 24th July, 1784. They say further that it appears by the case of *Coventry vs. Hall* (reported in 2 Cha. Cas., 71, 134; Cha. Rep., 259, and 1 Bac. Abr., 18), Chancery have extended their notions, and that the person who took the mesne profits by wrong is taken as trustee for, and accountant to, him that had the right. From the state of the evidence at the trial (as given by the chief justice), and the charge of the Court to the jury, it appears that it was submitted to the jury on the matters now in question, to determine, in the first instance, whether they were satisfied that there was any *misrepresentation* or *concealment*, which would clearly be a sufficient foundation for chancery to decree an account to be taken of the rents and profits.

Jacob Duche the elder came into possession of the premises under the title of his wife Hester, who held under the will of her first husband, Edward Bradley. During his intermarriage, he held the lands under the same right on which the alienee of the now plaintiffs recovered his possession. Had he come for-

ward after his wife's death, and made a full and candid representation of her will, instead of a *partial* one, to the plaintiffs; had he made fair communications to Haldane and wife, instead of holding up the idea that the real estate would be confiscated by the attainder of his son; and, after all, if Haldane and his wife had slept for years before they took possession, or instituted a suit for that purpose, my judgment on the whole, would be very different from what it is at present. But according to the facts stated, and the verdict found by the jury, I am bound to believe, that the present case has the ingredient of *concealment* in it, which is the exception put by the lord chancellor in the case of the Duke of Bolton *vs.* Deane (Preced. in Cha. 517).

But it has been much relied on by the defendants's counsel, that the plaintiffs having deprived themselves of their remedy at law, shall not have relief in chancery. I confess this appeared to me the most weighty objection on the argument. My mind is, however, now better satisfied. It is true, by the plaintiffs' conveyance to John Duffield, of the 2d March, 1786, they parted with their reversion, and therefore had no remedy by distress. But could they have distrained previously, on a demise by Jacob Duche for rents due by his tenants? If they could not, what remedy have they deprived themselves of by their own act? It is not similar to the case of Hitcham *vs.* Finch and Block (reported in 4 Vin. 388, who takes it from 1 Danv. Abr. 753. The original case is in 1 Rol. Abr. 375). There a copyhold tenant in fee of a manor, surrenders it to the use of one for life, the remainder to B., in fee. Tenant for life dies; B. pays no fine for his admittance, but after his death, it descends to his son who surrenders to the use of J. S., in fee. No fine is paid for it, and the rents of the tenement are several years in arrear. The lord grants the manor in fee to J. D. and then brings his bill in equity against J. S., the purchaser of the copyhold estate, for the rent in arrear, and the fines due before his sale. The Court of King's Bench granted a prohibition to the Court of Requests (who then exercised an inferior equity jurisdiction, which was afterwards adjudged an illegal usurpation of power), when the above matter being pleaded, was overruled on demurrer. It was resolved in B. R. that the lord had deprived himself of his remedy by his own act, viz: the sale of the manor, and should have no remedy in a Court of Equity, especially *against J. S., the purchaser, for the fines and arrears of rent due before his purchase.* The cases are materially distinguishable. Previous to this sale, the lord had a full and complete remedy by distress. But not so the plaintiffs in the case before the Court. There the remedy was sought against a purchaser for

valuable consideration, unacquainted in all human probability with the real claims of the lord of the manor. Here the remedy is sought against the estate of the person, who withheld the rents by concealment, and unfair communications, and who alone was benefited by the receipt thereof.

Upon the whole, on the best consideration I have been able to give to the argument, I am of opinion that the rule to show cause why a new trial should not be granted, be discharged, and that judgment be entered for the plaintiffs on the verdict.

Mr. Justice Bradford declined taking any part in the decision, having tried the cause as one of the plaintiffs' counsel.

Judgment for the plaintiffs.

JOHN FIELD and JOHN BERNARD (for the use of OXLEY and HANCOCK) *vs.* JAMES BIDDLE, Esq.

The general rule is, that a deed or will, or other written instrument, shall be expounded by its own words; but there are exceptions to it, as where parol evidence is brought, to ascertain a person or thing, to rebut an equity, or where a matter has not been inserted by fraud or mistake. Where a covenant is silent as to the kind of money to be paid, parol proof may be received to discover the intentions of the contracting parties.

DEBT 2,000*l.* sterling money of Great Britain, on an obligation, dated 1st May, 1786, executed by James Collins, and the defendant, to the plaintiffs as attorneys of Oxley and Hancock, conditioned for the payment of 1,000*l.* sterling, in good bills of exchange, on the first day of November, then following.

Defendant pleaded payment, with leave to give the special matters in evidence, and gave written notice agreeably to the rule of this Court, of the particular matters he intended to insist on in his defense under his plea. Replication *non solvit*, and issue.

It appeared on the evidence that the said James Collins and one Thomas Truxtun, merchants, in company, were indebted to the house of Oxley and Hancock, in London, in 5,826*l.* 2*s.* 6*d.* sterling, to whom the said John Field and John Bernard were attorneys in fact. The defendant was father-in-law of Collins. The affairs of Collins and Truxtun being embarrassed, it was agreed between the plaintiffs, as attorneys of Oxley and Hancock, of the first part, the said James Collins of the second part, and William Bell and John Pringle, as agents of the said Thomas Truxtun, of the third part, that the said Collins should give bond and security to the plaintiffs for the payment of 1,000*l.* sterling, on the 1st November, 1786, and then to be discharged from the residue of the debt due to Oxley and Hancock, and

that the said Bell and Pringle should pay 500*l.* sterling to the plaintiff, on account of the said Truxtun, upon his return from the East Indies, and he be also discharged — “Provided that the said discharges shall not take effect until the said Oxley and Hancock shall send in their ratification of the present contract, and that in the meanwhile the attorneys for Oxley and Hancock should have free access to the books of Collins and Truxtun.”

This indenture was dated 3d May, 1786. The defendant lived at Reading, in Berks county, and there executed the bond as security for his son-in-law, and on the 5th May, following, the same was delivered to the plaintiffs, who gave a receipt therefor, “in pursuance of the said indenture.”

The defendant offered to show in evidence the declarations of the plaintiffs, as attorneys of Oxley and Hancock, that the validity of the bond was to depend on the subsequent ratification of the contract by their constituents, Oxley and Hancock; that it was agreed between them and Collins at and immediately before the execution of the said indenture and obligation, that the terms of composition and the obligation in pursuance thereof should be wholly void, unless such ratification was sent in to Collins within six months; and that the said obligation was lodged in the hands of the said John Field, subject to such condition.

The plaintiffs’ counsel excepted to the testimony offered, as tending substantially to vary, contradict, and annul the written agreement, and produced some cases in support of their doctrine; but the Court, observing that at the sittings for Philadelphia county, during the preceding week, a similar point of law had been reserved for solemn argument, in the case of *Robert McMeen vs. Evan Owen*, and that it would greatly expedite business to bring on both arguments together, as they rested on the same principles, it was agreed that the question with respect to the parol evidence now offered should also be reserved for future consideration, and that William Bell, the witness, should be now sworn, which was done accordingly.

The plaintiffs’ counsel, in the course of the trial, offered John Field, one of the nominal plaintiffs, to be affirmed as a witness. They contended that it appeared, from the record and the testimony adduced, that he was not interested in the event of the cause. His name was merely made use of as one of the attorneys in fact of Oxley and Hancock; and he must be considered in the same predicament as where a trader commenced a suit

and he afterwards became a certificated bankrupt, the action might be carried on in his name, and he might be made use of as a witness. They instanced the case of *M'Clenachan vs. Scott*, cited 4 Dall., 173, in the Common Pleas of Philadelphia county, where this was done. As to the objection that he was liable to costs, they offered a sufficient person in Court, who undertook for the same. They said Courts of law would take judicial notice who is the real plaintiff, and in the case of *M'Cullum vs. Cox* (Dall., 139), this Court would not suffer a nominal plaintiff to discontinue. Here Field is only a bare trustee; and it is laid down in *Gilb. Law of Evid.*, 120, that an executor may be sworn in a cause relating to the will, where he is not a residuary legatee, because he is merely a trustee.

E contra, it was urged by the defendant's counsel that by Field's bringing the suit in his own name and Bernard's, he had made himself liable to the defendant for the costs, in case he failed in the action, and that this liability could be dispensed with by the defendant alone. The nominal plaintiffs might, if they thought proper, have assigned over the bond to their constituents, and then if they were not interested in the event they might be made use of as witnesses. A bare trustee is a good witness for his *cestui que* trust, but not an executor in trust, as he is liable to be sued by creditors, and to answer costs. 3 Wms., 181.

Per Curiam. We feel a strong repugnance against the testimony offered. Our present inclination is against the receiving of Field as a witness. We know of no case in the books, or by our practise, where a plaintiff has been admitted a witness to substantiate his demand to a jury. This point was very fully argued in an action of covenant, tried at York, May assizes, 1789, wherein Margaret Cochran, James M'Kissom, and William M'Kissom, executors of Andrew Cochran, were plaintiffs; and James Cochran and William Cochran, executors of William Cochran, deceased, were defendants. There James M'Kissom, one of the plaintiffs, was offered as a witness, and it appeared that he had no part of the residue devised to him by his testator. The Court there mentioned that they would rather err in the admission than in the rejection of testimony, but they thought themselves concluded against receiving the witness, and he was overruled. In that instance, the costs were offered to be lodged in Court. The plaintiffs here might have assigned the bond to Oxley and Hancock, if they chose it, and made themselves witnesses. As they have not done so, the present matter stands precisely in the

same situation as a factor selling goods for his principal, and bringing a suit for the money in his own name, where he is repelled from giving testimony. But if the suit be brought in the name of his constituents, the factor is a competent witness, though he gets 1s. in the pound, commissions on his sale. 1 Atky. 248; 3 Wills. 40.

However, if the plaintiff's counsel are willing to run the risk, we will not prevent Mr. Field from giving his testimony; but if he is affirmed, and a verdict should go for the plaintiffs, and upon a more full consideration we should retain our present opinion, on this point also reserved, a new trial will be awarded, without costs.

Mr. Field was accordingly affirmed, and he gave his testimony to the jury; but after a full hearing they found a verdict for the defendant.

Messrs. Ingersol and Rawle, *pro quer.*

Messrs. Lewis, Sergeant, and Thomas, *pro def.*

The same term, the reserved point in this case came before the Court, and also a point of the same nature in another action.

ROBERT M'MEEN vs. EVAN OWEN.

DEPENDING on the same principles. The latter was an action of covenant brought for non-payment of a sum of money due on the sale of a tract of land during the late war. The agreement did not specify in what kind of money the consideration was to be paid, but the bonds taken in pursuance thereof, called it *lawful* money of Pennsylvania. On the one side it was contended, that by the original agreement at and immediately before the drawing of the articles, it was stipulated that the payments should be made in whatever money was current at the time the several instalments became due; on the other, that it should be regulated by the scale of depreciation of continental money. One Isaac Lewis, who was present at the time of concluding the agreement and drew the article, was, after considerable debate, allowed to give testimony on the part of the plaintiff, explanatory of the contract as to the kind of money bargained for, and the jury gave a verdict for the plaintiff for the sum in specie.

Resp. The chancellor reserved the weight of the evidence to be judged of by himself, and it appearing to impugn the words of the will, he said it signified nothing.

Door vs. Geary. 1 Vez. 255. Parol evidence was admitted, to show the intentions of the testator in his will.

Resp. The description in the bequest was erroneous.

Mascal vs. Mascal. 1 Vez. 323. If a question arises on a will, evidences of testator's declarations is not to be received; but parol evidence was admitted to prove that a settlement was made in satisfaction of a legacy.

Resp. Here the adverse party examined the same witness.

Baker vs. Pain. 1 Vez. 457. How can a mistake in an agreement be proved but by parol evidence? Per Lord Chancellor.

Resp. In this case, the rough minutes and calculations corrected the mistake in the agreement.

Pitcairne vs. Ogbourne. 2 Vez. 375. Parol evidence was admitted to show that, though a bond on marriage was for 150*l.* per annum, yet the real agreement was for 100*l.* per annum; and thus to vary, and even contradict, the writing.

Resp. Here the grounds were fraud, it being a private agreement, to deceive a material party.

Harvey vs. Harvey. 2 Cha. Cas. 180. Parol agreement established by the testimony of Sir John Coel alone, against the trust expressed in a deed indented and made in consideration of marriage, though the lady had brought her husband a portion of 30,000*l.* in personal property, and was seized of lands of the yearly value of 1200*l.* or more.

Resp. The observation of Lord Chief Baron Reynolds, in the case of *Fitzgerald and executors vs. Lord Fauconberge et al.* Gilb. 213, 214, is the only answer that can be given; viz.: that it appeared plainly to be the design of the deed to screen the estate from sequestration, during the troubles.

The Court, without hearing the counsel in support of the parol testimony, who were about to speak, resolved that the evidence was properly received in both causes.

M'Kean, C. J. The general rule of law certainly is, that a deed, will, or other written instrument, must be expounded by its own words. But there are exceptions to this rule in the books, as where parol evidence is brought to ascertain a person or thing, or to rebut an equity, or where a matter has been omitted to be inserted in the writing, either by fraud, or through mistake. We will not venture to enumerate all the cases,

wherein to do essential and substantial justice, the Court may find themselves constrained to receive such unwritten testimony. In the case of Hurst's lessee *vs.* Kirkbride and Riche, tried at the Court of Nisi Prius for Bucks county, parol evidence was admitted to show that it was not the intention of Major Fell to include Pennsbury manor in a deed for all his lands in Pennsylvania, from what passed before and at the time of executing the articles of agreement. This determination was founded on the case of Harvey *vs.* Harvey, cited on the argument. Though it goes much further than the cases before us, it has been generally approved.* In many other cases since the Declaration of Independence, parol evidence has been received to explain, and, in some sort, to *vary*, what appeared on the *face* of the writings. Such was the resolution in Cochran's executors *vs.* Cochran's executors, tried at York, Nisi Prius, May, 1789, and heretofore cited in this cause, and many others, which I will not now recapitulate.

In Field et al. *vs.* Biddle, it was equivocal in some degree on the *mere words* of the indenture, what was the real intention of the parties as to the bond, in case Oxley and Hancock should not send in their ratification of the agreement within six months. The writing did not go so far as to enumerate that case. Indeed, it could scarcely be presumed that Mr. Biddle would have given his bond for 1000*l.* sterling, unless on the condition that Mr. Collins, his son-in-law, should be discharged from the remainder of Oxley and Hancock's demand. But why should we leave a matter to presumption or conjecture, when the true intention and meaning of the contracting parties can be ascertained with absolute precision, by unwritten evidence, not within the mischiefs which the general rule intended to obviate, namely, prevarication and misrepresentation? Besides, it appears to us, that the nominal plaintiffs were acting as attorneys in fact to Oxley and Hancock, under qualified powers, and that they either could not, or would not, give discharges, according to the agreement, without being authorized thereto by their constituents. What good reason can be assigned why we should not receive oral testimony to prove that this bond was delivered as an escrow to Field, and lodged with him, to take effect only on Oxley and Hancock transmitting their ratification of the composition within the stipulated period?

As to M'Meon *vs.* Owen, there was an ambiguity apparent on the face of the covenant. The kind of money is not therein described, which was agreed to be paid. Various species of money were then in circulation, and if parol evidence is not to be resorted to, in order to discover the real intentions of the con-

* See 4 Yeates, p. 281 *Contra*.

tracting parties, justice must necessarily be administered at random.

Shippen and Yeates, Justices, concurred.

Bradford J. I conceive myself bound by the determination in *Hurst's lessee vs. Kirkbride and Riche*, and now look on it as the settled law of Pennsylvania. That resolution goes further than the case of *Harvey vs. Harvey*, and I confess, the principles on which it was decided are not altogether satisfactory to my mind. That case alone has, however, determined my opinion, and I concur with the rest of the Court.

Judgment *pro def.* in *Field et al. vs. Biddle*.

Judgment *pro quer.* in *M'Meen vs. Ower*.

JOHN BLACK et al Executors of CALEB NEWBOLD vs. REMPUBLICAM.

The comptroller general has no power to settle demands arising from torts, or the wrongful acts of any of the officers of the state.

THIS was an appeal from the settlement of an account against the commonwealth by the comptroller general, under the acts of assembly, passed April 13th, 1782, and February 16th, 1785 (3 St. Laws, 51, 444).

The facts on the evidence turned out to be these: The testator was seized of an island in the state of New Jersey, called Newbold's Island, and had on it a considerable quantity of salted pork, gammons, and lard. In the month of December, 1776, when the British troops were advancing to this state through New Jersey, the officers of the state gallies moved their vessels up the river Delaware, and seized the above articles to prevent them from falling into the enemy's hands, who were then advanced to Bordentown. The captains of the gallies told William Bullen, the testator's agent, then on the island, that he should be fully paid for the provisions, though they could not then give him any receipts, or certificates. A considerable part of the articles seized were sent by Commodore Seymour to the council of safety in Philadelphia, which afterwards went to the use of the Continental army; part was given to the crews of the navy, part was distributed amongst the militia, who then served with the Continental troops, and a part was taken by the troops as a kind of plunder. It was proved to have been customary at that

time, for the staff officers, as well as those of the army and navy, to seize provisions near the lines, without any particular order for that purpose, and that in many such instances, certificates were given by the continental and state officers.

The questions arose, whether the state was properly chargeable in this suit, with the amount, "as articles furnished to the executive powers of the government, for the use of the same, or for any other purpose whatever," and whether the comptroller general ought to have allowed the account.

It was admitted by the counsel on both sides, and agreed by the Court, according to the decision in *Respublica vs. Sparhawk* (Dall. 363), that the Supreme Court had authority to confirm or alter any proceedings, that come properly before the comptroller general. But if he had no jurisdiction, that this Court can have none.

Mr. Tilghman for the plaintiff and Mr. Bayard for the state, used nearly the same arguments, as were urged in the case of *Sparhawk*. Dall. 358 to 363.

The plaintiff's counsel contended that the greater part of the provisions had gone to the use of the commonwealth, and that it did not comport with the honor and dignity of government, that they who suffered the loss should not receive a compensation from those who enjoyed the benefit. The terms of the law of 13th April, 1782, giving the comptroller general power to settle these accounts, were very general and would include this demand. The executive department had, by a kind of common consent, delegated their powers to the officers of the army and navy, and had usually ratified what they had done by giving certificates, and directing payment. It is doing no violence to the words of the act, to suppose the acts of those, who seized property for the public benefit, as the acts of the executive powers who sanctified the same. The delivery to a servant in the common course of dealing, is sufficient to charge the master. 1 Stra. 505, 506. So though the articles are not delivered over to the master. *Ibid*, 480.

E contra it was urged for the state, that if this demand can be at all sustained, it must be as a contract for articles furnished, by order of the legislative or executive powers. As to the executive powers giving such order, it must necessarily be supposed to be grounded on some lawful exercise of authority given

them by law, or the proper powers of their department. None such can be pretended in the present instance, nor indeed that the executive department gave the orders to seize. It never could have been the intention of the legislature, that the comptroller general should have the enormous power of settling all claims against the state for injuries done to individuals, in the course of the military operations during the late war. What a flood of claims would spring from a contrary doctrine! It would be too great and too dangerous a jurisdiction for any one man to exercise. He cannot settle claims for depreciation on certificates, for the emissions of the paper money of 1785, or that issued before, or for demands due from persons attainted, whose property has been sold by law. The commonwealth is not responsible for the tortious acts of its officers. Here the proper remedy was trespass against the persons who did the injury, not assumpsit against the state. A contract implies the agreement of two minds, which does not exist in this case. The militia when in service, were victualled and paid as continental troops. Journ. of Cong. for 1776, pa. 281, 509. The chief part of the provisions seized went to the use of the continent, and the application should be to congress for relief. But if any part of the articles are chargeable to this state in particular, recourse must be had to the legislature, who only can do complete justice.

Pro Repub. were cited 1 Black. Com. 241, 242. No one is superior to the sovereign power; every jurisdiction implies superiority. The sovereign is not amenable in any Court, unless by consent. 3 Black. Com. 254. The modes of obtaining redress from the king is by petition *de droit* or *monstrans de droit*. 1 Term Rep. 176. Whoever now in England supplies the public, trusts the parliament.

Per Curiam. It has been rightly agreed on all hands, that we have no jurisdiction, unless the comptroller general had, under the act of 1782. The executive powers specified in that act, must certainly be intended the civil executive. And the question here is, whether the articles were furnished by order of the executive.

It is clear, there was no contract between the executive department and Caleb Newbold. The captains of the galleys were excusable in removing the provisions, lest they should fall into the enemies hands; but still in law it must be considered as a tortious act. They were not authorized to do it, by the directions of their superiors. Indeed it is impossible to suppose the executive of Pennsylvania could direct them to seize provisions

on Newbold's Island, in a sister state. Their powers did not reach thither, nor did they ever exercise jurisdiction there. But it is not pretended there was such an express authority given them.

We are fully satisfied the legislature of Pennsylvania never meant to give the comptroller general a power to settle demands of this nature, arising from torts or wrongful acts of any of their officers. The remedy of the plaintiffs, if any of the provisions have come to the particular benefit of the state, is by application to the legislature, who have reserved these extraordinary powers to themselves. And where the property has gone to the use of the Union at large, the party must resort to congress, who will unquestionably do them justice, upon the proper proofs being made.

Verdict *pro Republica.*

PATTERSON HARTSHORNE and EBENEZER LARGE vs. JAMES CAMPBELL and STEPHEN KINGSTON.

In a suit against the owners of a vessel for the misconduct of their captain, the opinion of a counsel taken on all the facts by the captain in the West Indies, was allowed to be read in evidence, as a fact.

CASE, against the defendants, as owners of the brigantine *Mary*, for the misconduct of Adam Caldwell, their captain.

The plaintiffs, in 1787, shipped a quantity of honey on board the brigantine, to be delivered at Dublin, and produced the captain's bill of lading.

The defendants showed in evidence the protest of the captain made at St. Christopher's, stating that the vessel met with heavy gales of wind in her passage, became very leaky, and lost her rudder; the captain's petition to the commander-in-chief of that island, stating all the facts, and praying leave to repair the vessel, which was granted to him; a warrant to survey the ship, issued by the register of the admiralty, directed to certain shipwrights and shipmasters, and their return of her being wholly unworthy of being repaired, being in a most ruinous condition, and also the order of condemnation of the judge of the admiralty, directing her to be sold.

The opinion of a Mr. Tucket, attorney general of St. Christopher's, was taken by Captain Caldwell, on a full statement of all the facts, advising him to sell the perishable articles of the cargo at public vendue, and was offered to be read in evidence, but

was opposed by the plaintiffs' counsel, who said his opinion was no evidence of the law maritime.

But, *per Curiam*. The evidence is introduced to show a fact, that the captain took every prudential step in his power before he proceeded to the sale of what remained of the cargo. His taking the advice of a person of character and skilled in the laws before he actually sold the goods, is strong evidence of this, though unquestionably it is not conclusive as to the law.

The opinion was read without further opposition; and, after some time, a juror was withdrawn by consent, to adjust amicably the average loss.

Mr. Lewis, *pro quer*.

Messrs. Tilghman and Heatly, *pro def*.

JAMES MILLER *vs.* BLAIR M'CLENACHAN, THOMAS BARCLAY, and
SAMUEL CALDWELL, who survived JAMES MEASE.

In a suit against partners, one of the defendants, though willing, cannot prove the partnership, as he would thereby exonerate himself of part of a partnership debt.

SUIT on three bills of exchange for 400*l.* sterling, drawn by Mease and Caldwell on Thomas Barclay, payable to the plaintiff, to be placed to the credit of the ship Alexander and her cargo, which were protested.

One of the counts in the declaration charged the defendants as owners of the ship, and that they drew the bills; another count, that Mease and Caldwell drew the bills as agents of the defendants.

The partnership of the defendants in the ship and cargo being denied, it became necessary to prove it. The plaintiff's counsel offered Samuel Caldwell, one of the defendants, to prove it, and contended that he was a competent witness for the plaintiff if he would submit to be sworn; but the Court hinting their opinion that he was evidently interested, he being chargeable for the bills drawn by the house of Mease and Caldwell which were protested, and, by throwing part of the burthen on the other defendants, would thereby exonerate himself *pro tanto*, the witness was waived, and the plaintiff afterwards became non-suit.

Messrs. Ingersol and Tilghman, *pro quer*.

Messrs. Sergeant and Wilcocks, *pro def*.

PRESIDENT AND DIRECTORS OF THE COMPANY OF THE BANK OF NORTH AMERICA, *vs.* ROBERT M'KNIGHT, who survived WILLIAM ALLISON.

What is reasonable time of notice to give to an indorser of a promissory note of its being dishonored, is settled to be matter of law; but the strictness required in England has not obtained here. Protests are not absolutely necessary on notes being dishonored.

ACTION against the defendant as surviving indorser of two promissory notes. One of them was not disputed. The other which came in question, was a note for \$425, dated 10th February, 1785, drawn by Isaac Sidman, payable to Allison and M'Knight, or order, in forty-five days after date, and by them indorsed to the bank. This note, therefore, became due on the 27th March, and the three days of grace expired on the 30th March.

It appeared in evidence, that the note had been discounted at the bank at the particular request of the defendant, and that he complained of its not being done on his first application; that he had promised to take up the note as the accommodation was made on the credit of their house, and that it was the uniform practise of the bank, that the persons who received the accommodation, should indorse the note upon receiving the money, though they had actually made the note in the first instance; and the runner of the bank swore that the second day after the days of grace were expired, he gave notice to M'Knight and Allison that the note was not paid.

On the part of the defendants it was proved that Sidman, at the time of drawing the note, was actually indebted to Allison and M'Knight. The protest was not made until the 4th April.

Mr. Moses Levy, for the defendant, insisted that due diligence had not been used by the plaintiffs in giving the defendant notice, and that thereby they had made the note their own. It is of consequence to the mercantile world that the greatest strictness should be used in these transactions. It has been resolved in *Robinson et al., vs. Vogel* (Dall. 255), that the right of indorsees to call upon the indorsers of notes, is founded on the custom of merchants, and the Courts will proceed on them as on bills of exchange under the stat. of 3 and 4 Annæ, c. 9. There it appears that a very trifling negligence on the part of the holder, will operate as a discharge to the indorser. This rule is admitted in that case to be just and proper when the course of trade is regular. It is true, there is a distinction taken between the rules laid down in England and this state, as to sending notice by the *next post* to the indorser, who lives at a distance from the indorsee, owing to the local situation of this country, and the want of that regular and uniform means of communication

which exists in Great Britain; but where they live near to each other, the rule subsists equally in both countries, and is grounded on reason equally applicable to each. A bill given on a banker at twelve at noon and accepted at night; the banker stopped payment before morning; the jury found a verdict for the defendant, on a suit brought by the payee of the bill against the drawer, and a new trial was refused by the Court. And per Foster, J., reasonable time is what time is sufficient to receive the money in. *Hankey vs. Trotman*. 1 Blackst. Rep., 1. (Vid. Tindel et al., *vs. Brown*. 1 Term Rep., 167.) Notes in towns must be demanded of the drawer the next day after they become due, adding the days of grace. Bayley on Bills, 40. And the solvency or insolvency of the drawer does not alter the necessity of notice within the proper time to the indorser. *Ib.*, 30. The reasonableness of the time of notice to the indorser is a question of law to be determined by the Court. Lovelass on Bills, 162. Kyd on Bills, 82. Here the notice to the indorsers was not given in due time, and therefore the indorsees cannot resort to them for remedy. They have forfeited their right of recovery by their own laches.

Messrs. Lewis and Tilghman *pro quer.*, admitted the principle, that in general cases, the holder of a note should give notice to the indorser in a reasonable time; but the matter now before the Court is taken out of the common rule, for the bank gave the credit to the house of the defendant, and his promising to take up the note on the accommodation being made to his own benefit, waived the necessity of giving him any notice whatever. Independent, however, of this circumstance, the strictness of notice required in England, has not been, nor ought to be, adopted in Pennsylvania, on account of our peculiar circumstances.

No protest was necessary in England on an inland bill of exchange, until the stat. of 9 and 10 Will. 3, c. 17. The stat. of 3 and 4 Annæ, c. 9, put promissory notes, when indorsed, on the same footing with inland bills; that is, it rendered them negotiable in the same manner, and gave the same remedy to the possessor. Kyd, 79. But both these statutes have been extended by practise only, and in those points only where the situation of this country required it. It never has been the usage of Pennsylvania, either in her Courts of justice, or amongst mercantile characters, or others, to adopt the strict rules applicable to banking houses in Great Britain, in the cases of promissory notes, nor would it redound to the interests or convenience of the community to pursue them. What is reasonable time as to notice, must be, and always hitherto has been, governed by the circumstances of each transaction.

M^r Kean C. J. I sit single in the determination of this cause, my brethren declining to take any part in the decision, as being stockholders in the Bank of North America. The present case seems to differ from ordinary notes, by reason of the special undertaking of the defendant. In this business, notice was given to the indorser the second day after the note became due, allowing for the usual days of grace. A single day has only intervened.

What is reasonable time for notice in such cases where the parties live in the same city, or near to each other, is now settled to be matter of law, in order to preserve an uniformity of decision. Great strictness is required as to this point in England, and it is right that it should be so when so large a paper credit is in circulation, and where so many purchases are made in the national funds. The rule then is, that notice should be given to the indorser when the bill or note is dishonored, the day after the expiration of the days of grace, where the parties live in the same city or town; and by the next post, where they live at a distance from each other. This strictness has not obtained amongst us. Before the late revolution, no protests were made on promissory notes, nor is it now usual, except in this city, in the transactions of the bank; nor is it absolutely necessary. Vide 1 Espin. 36. It has not been the custom, nor has it been the general prevailing idea, that there existed any necessity to call on the drawer on the very day the note became demandable, or to give the indorser immediate notice. No period has been fixed for such notice by any judicial determinations amongst us, that I know of. It seems to have rested on the general observation made by Judge Shippen (Dall. 255), that if the holder of a note, without giving notice of its being dishonored, retains it so long in his hands after the day of payment as to create a presumption that he means to take upon himself to give a new credit to the drawer, the want of notice will operate as a discharge. And in the succeeding page he declares, if the holder of the note retains it two or three months, or any other unreasonable time, without giving notice to the indorser, he ought certainly to bear the loss.

As no precise rule has yet been fixed, neither will I, circumstanced as the Court is, lay one down in this case, but will submit it to the jury, whether, taking into consideration the general custom which has hitherto prevailed, and also the special undertaking of the defendants, there has been notice given to the indorser in reasonable and convenient time. It will soon become necessary for the Court to adopt some fixed rule as to *future cases*, where the holders of the bill and indorsers live in the same

city or town. The business of banking has greatly increased of late, and circumstances exist among us at present which make a greater degree of strictness, as to notice to indorsers necessary, than has formerly obtained.

Verdict for the plaintiffs, on both notes.

STEPHEN STEWART, sr., and STEPHEN STEWART, jr. (for the use of LEVI HOLLINGSWORTH and JOSEPH CARSON), *vs.* JOHN ROSS.

Depositions of witnesses taken under a commission, allowed to be read in evidence, though all the interrogatories have not been answered, the commissioners on both sides, and one of the plaintiffs, having attended the execution of the commission.

DEBT. Exception was taken in this cause to the execution of a certain commission issued to Baltimore, in Maryland, because answers had not been given to all the plaintiff's interrogatories by the witnesses examined for the defendant.

Per Curiam. It appears here that the commissioners appointed on both sides have attended the execution of the commission. There therefore can be no reasonable grounds of suspicion, as there might possibly have been if the commissioners for the defendant alone had attended.

Besides, one of the plaintiffs was present, and we must presume that he waived the taking or putting down the answers, or that the witnesses knew nothing of the facts referred to.

Moreover it appears to us, that the interrogatories to which there are no answers are specially calculated to be addressed to the clerks of the plaintiffs who have not been examined.

The commission and return were therefore read in evidence.

Messrs. Lewis, Sergeant, and Hallowell, *pro quer.*

Messrs. Ingersol and Mifflin, *pro def.*

MATTHEW HENDERSON *vs.* MATTHEW CLARKSON.

Agent of seamen, to receive their prize money, may sue in his own name, and where the action cannot possibly draw into controversy, the question of "prize or no prize," it may be brought in a Court of Common Law.

CASE. The declaration contained two counts: One for 1000*l.* had and received to the plaintiff's use; the other for 1000*l.* lent.

The case upon the evidence appeared to be this: The plaintiff was appointed agent for forty-three seamen on board the privateer brig, Holkar, Roger Kean, commander, to receive their

prize money. The defendant was marshal of the Court of Admiralty of Pennsylvania, where two of the prizes were libelled, condemned, and sold. Plaintiff, on the 27th December, 1781, gave a bond to the commonwealth in 2500*l.* penalty, conditioned to account faithfully with the seamen, and pay over the shares unclaimed within one year to the use of the corporation of contributors to the Pennsylvania Hospital. The judge of the admiralty on that day also issued a writ of delivery to the defendant as marshal, to deliver over the goods and money due to the owners and seamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. This suit was brought to recover the prize money due to the plaintiff's constituents; the marshal had paid a considerable part, and rendered his account, but some of the items therein were disputed.

It was objected by Messrs. Lewis and Sergeant, *pro def.*, that this suit was not properly instituted. There is no count for money paid to the defendant's use; and in that view only, can the plaintiff support his action in his own name, as having paid his constituents their prize money. If they have not received it, actions should have been brought in their separate names (2 Stra. 781, though they might sue jointly in the admiralty), as their appointing him their agent did not vest him with the title to the money, so as to recover in his own right. This suit is not of common law jurisdiction, but belongs to the admiralty as a prize Court. There is a peculiar propriety in calling an officer to an account in his own Court, as being best acquainted with its own fees and usages. This suit is brought with the express design of carrying into execution the decree of the Court of Admiralty, which it cannot effect according to the general reasoning and spirit of the case of Doane's admin. *vs.* Penhallow *et al.* Dall. 218. *Vide*, also, Ib. 95. Courts of common law have jurisdiction where the money comes into the hands of an agent, in consequence of a power given on land; *aliter* where it remains in the hands of the proper officer of the Court, for there it is in the custody of the law. The question of prize or no prize, and all its consequences, belong solely to the Court of Admiralty. Dall. 218. Doug. 572. Admiralty has the exclusive jurisdiction in cases of prize and their consequences. 3 Term Rep. 323, 344.

It was answered by Messrs. Moses Levy and Cox *pro quer.* that the defendant had but little ground of complaint for being prosecuted in one action, instead of forty-three different ones. The plaintiff here was an agent of a peculiar kind created by

law. The act of assembly of 8th March, 1780, § 13, declared that the agents of the owners and seamen had a right to take the prize from the marshal, and sell the property by private sale, for the best advantage of the persons interested; though by the supplement passed on the 22d September, 1780, § 10, the marshal is directed to sell the same, and distribute the net proceeds as by the said act is directed, within twenty days after the sale is completed, under the penalty of 20 per cent for the sum neglected to be paid, to be recovered in an action brought for the same. When the defendant did not deliver the property according to the writ, the plaintiff had a right to prosecute him at law; he might waive the penalty and proceed for the sum really due, as much as a consignee might on the sale of goods for his principal. Agents having an interest by statute, the agency is good to the survivor; and when they have such interest, they may sue at law. The rights accruing by statute are subjects of jurisdiction in the common law Courts. Hen. Blackst. 476, 514, 515, 522, 523. Vendee of a prize share may maintain a suit at common law, against the agent of a ship. 1 Wils, 210. Common law Courts have cognizance of certain matters, though in some degree the result of a prize cause. Dall. 95, 103. It is a matter of national policy to constitute Prize Courts, to preserve peace with foreign powers; but the question of prize or no prize, cannot possibly be controverted here. Defendant *has* sold under the decree of the admiralty, and under that very decree the plaintiff claims. The present objection is in nature of a plea to the jurisdiction of this Court, and in pleas to the jurisdiction, another Court of competent jurisdiction must be shown. Cowp. 172. The Admiralty Court of Pennsylvania no longer exists, nor could its decree be carried into effect by the Court of Admiralty erected under the present government.

Per Curiam. Two objections are made against the plaintiff's recovery. 1st. That the plaintiff is a mere agent, and sues in his own name. 2d. That the jurisdiction of this cause belongs to the Court Maritime.

As to the first point. When it became necessary to take up arms against Great Britain, Congress was considered as the sovereign power of the then United Colonies. They resolved that Letters of Marque and Reprisal should issue, and surrendered up their right to the prizes, and ordered the money arising therefrom to be distributed in such manner, as should, by articles, be agreed between the adventurers. The captors, therefore, became legally entitled to the prizes taken, but Maritime Courts were erected to decide the question of prize or no prize. The act

of assembly of 8th March, 1780, directs the appointment of an agent by the judge for the owners and seamen (who have not appointed one themselves) he giving security as the act directs; and the agent is impowered to take the prize from the marshall and sell it by private sale. The act of 22d September 1780, alters this provision, and directs the marshall to sell and make distribution of the net proceeds as in and by the first act is prescribed, under the penalty of 20 per cent. Both these acts must be construed together as one law; and it is evident that if the captors of any of them do not claim their shares in the period of twelve months, such unclaimed shares go over to the Pennsylvania Hospital, subject to being reclaimed within three years. The agent therefore, by law, must be considered as a common head or centre for the captors and hospital, and may sue in his own name under the interest acquired by those acts, as the captors themselves might have done.

As to the second point. This action cannot draw into controversy the question of prize or no prize, nor can it possibly come into review, the plaintiff claiming under the decree of the Court of Admiralty. The marshal returns to the judge, that he has the goods and money ready to be delivered to the captors or their agents. Does not this amount to a written promise to pay to the plaintiff as agent of the seamen? And what can there be incidental to it, as a prize case, which can involve the decision, whether prize or no prize? Surely nothing.

The points of law having been thus resolved by the Court, it was agreed by the counsel on both sides, that the marshal's account should be decided upon by the jurors as referees, and next morning a verdict was given for the plaintiff for 54*l.* 4*s.* 6*d.* damages, and six pence costs.

LETTICE WINDER *vs.* EDMUND WINDER LITTLE.

An *ex parte* affidavit is good evidence to prove the identity of a person, so far as it respects his marriage or pedigree. Damages in dower to be found since the time of demand made, either in pais or by matter of record; but not of the improved value, after a sale by the husband.

DOWER. Pleas, *ne unques accouple in loyal matrimonie*, and *touts tems prist*.

The plaintiff lived in Great Britian, and to prove that she was intitled as the widow of Edmund Winder, Mr. Sergeant her counsel, produced a copy of the parish register by the vicar, certifying her marriage with Edmund Winder, on the 11th May, 1727, at a place called "Goosenargh," in Lancashire, in Great Britian, which was proved by a witness in Court to have been compared with the original entry. To prove the identy of the said Edmund, and that he was the person who had died seized of the house in question, the *ex parte* affidavit of one Thomas Fisher, now living in Lancashire, aforesaid (whose sister was the said Edmund's first wife), was produced, showing that he was present at his second marriage with the plaintiff, when he left England, and that he had corresponded with him since his arrival in Philadelphia in 1732, and these letters were produced in Court, and proved to be his hand writing. This affidavit was objected to by Messrs. Rawle and Coxe, *pro def.*, as not being legal evidence of the identity, though it might be of marriage or pedigree, on the ground of necessity. But the Court ruled that it was a good and legal evidence of the identity so far as it respected the marriage and pedigree, and was strictly within the reason why such evidence was proper in the case of pedigree. They said the same point had been determined at Lancaster, May assizes, 1787, in the case of Fockler's lessee *vs.* Simpson.

Several letters from the said Edmund Winder to the said Thomas Fisher, from 1761 to 1778, were read in evidence, which styled the plaintiff his sister, and complained that impertinent inquiries were made concerning him by the seamen of the ships coming from Enrope, and threatening to remove to more distant parts in case such inquiries were persisted in.

The defendant's counsel insisted that the plaintiff could not be entitled as the wife of the said Edmund Winder, and produced a number of letters found in the chest of the deceased, from the said Thomas Fisher, the plaintiff, the mother of the said Edmund, and others of his relations in England, wherein no mention is made of his having a wife in Lancashire, the said Fisher calling the plaintiff "sister Letty." They proved that he had married a wife in New Jersey, and cohabited with her twenty-five years, and that they were considered in the neigh-

berhood as man and wife. By his will, dated 15th July, 1778, he gives all his property to his friends in America, without taking any notice whatever of his having a wife or child in England. Some original memorandum books in the hand writing of the said Edmund Winder were also shown, wherein his birth, the time of his arrival in Philadelphia, his last marriage, the death of his last wife, and several other events were noted down; and a number of entries were also made, as the heads of a will, &c. which could not be explained, unless on the grounds of his being married to a second wife in England, having had a daughter by her, and leaving them and his friends on some disgust. The whole transactions wore the appearance of great mystery.

The defendant's counsel contended, that if the jury should be satisfied that the plaintiff was the widow of the said Edmund Winder, they could only find damages for her from the time of her instituting the suit, under the plea of *touts tems prist*, and cited 2 Bac. Abr. 149; Co. Lit. 32, and Gilb. on Dower, 875.

The chief justice gave the charge of the Court to the jury to the following effect:—

The plaintiff has produced positive proof of her intermarriage with Edmund Winder deceased, who died seized of the house in question. The affidavit of Thomas Fisher (brother of the first wife of the said Edmund) besides strengthening the proof of the second marriage in England, ascertains the identity of the demandant and her late husband, and that he received several letters from him in the course of their correspondence, which are now produced and proved to be the said Edmund's hand writing. The letters produced by the plaintiff's counsel, and above all the entries made in the original memorandum books of the deceased, throw considerable light on the business. Yet after all it must be confessed, that some doubts must arise from the letters shown by the defendant from the deceased's friends in Lancashire, from his marriage in New Jersey, and his last will. His arrival in Philadelphia was near sixty years ago, and it must necessarily be supposed that much darkness and obscurity must attend transactions of that period of time. These doubts, however, do not, in our idea, countervail the positive clear proof adduced for the plaintiff, but the jury must weigh the whole, and decide on the matter of fact under all its circumstances.

If the jury concur with the Court in opinion, they will find a verdict for the demandant, and assess damages at one-third part

DEBORAH WYNNE, JAMES CHRISTY, JOSEPH NICHOLSON, and
JAMES CHRISTY, jun., executors of GEORGE WYNNE, deceased,
vs. RICHARD ADAMS.

On a rule for trial or *non pros*, the plaintiff cannot object that he has not filed his declaration.

SUR rule for trial or *non pros*. Mr. Heatly, for the defendant, moved that a *non pros* might be entered according to the rule, the cause not having been brought on to trial, during the term.

Mr. Morris, for the plaintiff, objected, that though a plea had been put in and issue joined, no declaration had been filed, and the defendant should have taken a rule to declare, and thereby enforced the plaintiff to proceed without delay.

Per Curiam. The plaintiff shall not take advantage of his own neglect and laches. Besides, if the objection has any weight, it should have been made when the rule was taken at the last term; and a case in the Common Pleas, before Mr. Justice Shippen, was cited, where in replevin, the cause being at issue, but no declaration filed, the defendant moved for trial, both parties being actors, and the present exception was taken, but the same was overruled by the Court.

Non pros directed to be entered.

BENJAMIN HARVEY and ELISHA HARVEY, plaintiffs in error, vs.
JACOB SNOW, lessee of JOSHUA AUSTIN and CALEB AUSTIN.

Ejectments may be submitted by rule of reference, and where the report is for plaintiff, but finds no costs, they shall be awarded. So the report is good, though no damages are found. Where damages only are to be recovered, if none are found, the verdict would be bad, but it is otherwise in ejectment, debt, &c., where anything is to be recovered besides damages.

WRIT of error of a judgment in ejectment in Luzerne county.
Plea in *nullo est erratum*.

On the part of the plaintiffs in error (the defendants below) three exceptions were taken.

It appeared on the record that the cause had been referred by mutual consent, and that the referees had found the defendants guilty of the trespass and ejectment, but had assessed no damages or costs. The Court had given judgment for the plaintiff and awarded costs.

Exception 1st. That ejectments are not within the act of assembly, respecting the appointment of referees.

2. No damages are found, as by law they ought.

3. The Court have awarded costs, though no damages or costs found by the report.

The first point was given up without difficulty, by Mr. Lewis, counsel for the plaintiffs in error, on its being suggested, that this point had been heretofore settled by adjudications, and that the Courts of justice had frequently adopted this method of terminating ejectments. Dallas, 314, 365.

On the second point, it was said, that ejectments were originally intended to recover damages only. 3 Blackst. Com., 199. And where damages ought to be found, a verdict would be insufficient without such finding. Tri. per Pais., 259. But this point was not much pressed upon a case being cited in the Common Pleas of Philadelphia county, Emigh's lessee *vs.* Rinehart, where in an ejectment for a house in the city of Philadelphia, a verdict had been found for the plaintiffs, but no damages assessed, it was held that the verdict was not vitiated thereby. 1 Tri. per Pais., 297. Vid. 5 Bac. Abr., 324. 2 Lil. Abr., 652. Verdict on a writ of annuity without finding damages, is imperfect, but a release of them makes it good. 11 Co. 56, *a*.

It was, however, insisted that this release should have been made on the record of the Court of Common Pleas, previous to the judgment. 2 Stra., 1171.

Mr. Ingersol for the defendant in error, insisted that the third exception was to be ranked amongst the *apices litigandi*. As to the *remittitur* of the damages before judgment being entered on record, it had never been the practise in Pennsylvania, and such practise was the law of the land. The minds of the judges have greatly relaxed of late years, and they do not now regard those critical niceties which were formerly so much attended to. In the note in 2 Bac. Abr., 220, referring to the case in 11 Co., 56, *a*, and the other books, wherein it is reported, it is said, "by which books it appears that the plaintiff, before judgment, released his damages and had judgment for the annuity only, which made it *more clear*, and so it is in Rol., 784, S. C.," which shows that it would have been *clear*, independent of such release.

In the first chapter of Sayer's Law of Costs, it appears that where damages may be given, costs may be recovered. Though the jury neglect or refuse to find costs, the Court may award them, and will order the defect to be supplied on the *postea*. Sayer on Costs, 270. Cites 2 Saund., 257. It is not necessary that the jury should give costs, but they may leave it to the

Court to do it. 1 Lil. Abr., 338. Where the plaintiff in ejectment recovers, he may remit his damages and have his costs. Gilb. Law of Ejectments, 305.

This law holds with peculiar force in Pennsylvania on reports of referees, who seldom or never either in ejectments or other species of actions, find costs; and it would be attended with the greatest inconveniences if judgments rendered on them should be overthrown on writs of error. Nice form is not expected in special verdicts, because they are the finding of laymen. 1 Tri. per Pais., 297. The reason applies in a much stronger degree to reports in Pais.

In the present instance no injury was done to the defendants below, in not finding damages or costs against them. And no one shall reverse a judgment for error, if he cannot show the error was to his disadvantage. 5 Co. 39, b.

But if the Court should be of opinion that the judgment below is not good as to the costs, it may be affirmed as to the recovery of the term, which is a distinct and independent judgment. A judgment in the Court of Common Pleas, affirmed on a writ of error there, with costs, in the King's Bench, was removed by another writ of error to the King's Bench in England, and the judgment as to the costs in B. R., in Ireland, reversed, but the judgment of the Common Pleas affirmed, because separate judgments. 2 Ld. Raym., 893.

S. P. 2 Stra. 807. 2 Ld. Raym., 1534; and affirmed in the House of Lords.

Mr. Lewis, in reply. The case in 2 Stra. 1171, clearly proves that the *remittitur* must be entered on record before judgment. In Gilb. Law of Ejectments, 305, the plaintiff on two demises, recovered one term and damages, but as to the other demise, he recovered nothing.

No damages found on a mandamus, there can be no judgment for costs, nor can the defect be supplied by a writ of inquiry. 2 Stra., 1051.

As to the inconveniences apprehended from reversing judgments on reports, where damages have not been found and costs have been awarded, they cannot subsist; because by the defalcation act of 4th Annæ (p. 49), jurors and referees, in matters of mutual account, need only find the precise sum due, without assessing damages, by the express terms of the law.

There is a distinction as to reversing judgments in part, and affirming them in part, where the matter comes before a first Court of Error, and where it comes before a second Court of Error. 2 Stra. 807. But an entire judgment cannot be reversed

in part. Several damages given by the jury on several counts, of which one was good and the other ill, one entire judgment given for both; it shall be reversed for the whole. 2 Ld. Raym. 825. Suit on a bill and also on an *emisset*; on the first, judgment is entered *quod capiatur*, and on thy other, *quod sit in misericordia* is not entered, it must be reversed in toto. 2 Bac. Abr. 228. Cites Rol. Abr. 775, 6. So in debt for rent on two distinct demises, and the one demise is laid right and the other ill, judgment being entire, must be wholly reversed. Ib. Cites Carth. 224, 5. In account render, where the first judgment is *quod computat*, and upon auditors assigned, the second judgment is erroneous, the last judgment only shall be reversed, because they are two distinct and perfect judgments. Ib. Cites Cro. El. 776, 806. But it is otherwise as to the case now before the Court, which is one single and entire judgment.

As to the doctrine contended for, that one shall not assign for error what is for his own advantage, the rule does not hold where the error is the act of the Court, though it be for the advantage of the party. 2 Bac. Abr. 220. Cites 8 Co. 59. Rol. Abr. 759.

Per Curiam. Where damages only are to be recovered, if none are found, the verdict would be bad; but it is otherwise in ejectment, debt, &c., where anything is to be recovered besides damages. 1 Trial, *per pais*, 293. The damages in ejectment are merely nominal; an action for mesne profits is consequential to the recovery in ejectment. Runnington on Ejectments, 164. We apprehend that on a similar verdict to the present report in Westminster Hall, the exception would be overruled; but, in Pennsylvania, costs are seldom or never specified in reports on ejectment causes. References in such cases are entered into to ascertain in whom the title is, and the costs are consequential thereon. The *argumentum ab inconvenienti* holds most strongly in the present instance. Courts of justice now consider awards with great liberality and latitude. Dallas, 174. And it is the interest of the community that they should do so. It would be attended with the most dangerous consequences to set aside reports for such critical niceties, and such cases are much stronger than those of special verdicts, which are generally found under the direction of counsel at the bar.

Wherefore let the judgment be affirmed in toto.

MOSES FITCH ALDEN, Plaintiff in Error, *vs.* ANDREW LEE.

Landlord may proceed, by ejectment, against his tenant, to recover possession. Where proceedings between landlord and tenant are reversed for error, the Court are not bound *ex debito justitiæ* to award restitution.

WRIT of error to Luzerne county. The record stated that the parties had appeared personally in the Court of Common Pleas of that county, and desired to enter an amicable action, which was done accordingly.

Lee, by his attorney, thereupon declared, *ore tenus*, that he had demised a saw-mill and certain lands to Fitch Alden for a certain term, paying rent; that the term was fully ended; that three months had elapsed since he had made demand of him to leave the premises, and that he was quietly and peaceably possessed thereof before he demised the same.

The defendant below, Fitch Alden, by his attorney, denied each of these facts, *ore tenus*, on which they were at issue; and by their consent, a jury being immediately called, came, who, being balloted for, tried, sworn, and affirmed, found the defendant guilty, in manner and form as the plaintiff had declared; upon which the Court gave judgment that the plaintiff should recover possession of the premises, and awarded a writ of possession, which was executed by the sheriff.

Mr. Sergeant, for the plaintiff in error, took three exceptions to the record: 1st, The Court of Common Pleas had no jurisdiction in a cause between landlord and tenant, which, by the act of 21st March, 1772 (p. 436), belonged to two justices of the peace; nor does it appear by the record that the judges of the Court were justices of the peace. 2d, The jurors in such a case should be freeholderers by the words of the said act, and it appears here, the common jury returned by the sheriff, tried the cause. 3d, The proceedings are informal, not being according to the course of the common law.

He cited Holt, 394. The admittance of the parties does not give jurisdiction to a Court. 1 Vez. 471. Appearance or consent gives no jurisdiction, but the same may be called in question at any time. 3 Burr. 1366. Where a statute directs a previous application to two justices, and the sessions take up the matter in the first instance *per saltum*, their order must be quashed.

Mr. Ingersol, for the defendant in error, insisted that it appeared judicially to the Court, that the justices of the Court of Common Pleas were justices of the peace, and as such might entertain the cause, as between landlord and tenant; that though

two justices had the power under the words of the act, yet a greater number was no cause of exception, as *omne majus continet in se minus*, 2 Bulst., 48, 49, and the parties might waive a formal mode of proceeding by mutual consent. But were it otherwise, it could not be denied, but the landlord might proceed by way of ejectment against his tenant in the Court of Common Pleas, for the recovery of his possession, or in an amicable suit to try his right of possession, although he might also pursue the summary mode pointed out by the act of 1772. He admitted that consent would not give jurisdiction, though it would take away error, where there was jurisdiction. Co. Lit., 126 a. So in the case of a *venire facias* issuing *ex assensu partium*. 5 Co., 36 b. Here the parties might agree to submit the right of possession in this mode, in the nature of an ejectment, to the Court of Common Pleas; that the proceedings should be *ore tenus*, as in days of yore; and that the common jury should pass on the matter in controversy, and that they would be bound by the decision.

Per Curiam. The landlord might certainly have proceeded by ejectment, in the Court of Common Pleas, if he had thought proper; but he should then have pursued the proper forms pointed out by the course of the common law. Here is no ejectment entered; and it is impossible to vindicate these proceedings, being altogether unprecedented. The judgment, therefore, must be reversed.

Mr. Sergeant then moved that a writ of restitution might issue, and cited 2 Bac. Abr., 231. When proceedings are reversed on error, and there has been a term sold to a stranger under a *fi. fa.*, the party shall be restored to the money for which his term was sold.

But the Court said they would not, in a case similar to the present, where the plaintiff in error wished to avoid his own act, grant such writ, unless they were constrained to do it by law; which did not at present appear to them.

At the instance, however, of Mr. Sergeant, they continued his motion for a writ of restitution, under advisement.

AT NISI PRIUS, AT EASTON,
APRIL ASSIZES, 1792.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

Lessee of CHRISTIAN BROWN *vs.* JOHN LONG.

Warrant dated 20th August, 1765. A survey made in pursuance of a warrant said to be deated 21st August, 1765, may be read in evidence, if the lines correspond with the terms of the first warrant, and a certificate of the surveyor general is shown, that no such warrant of the 21st August, 1765, is to be found in his office.

A deed proved to be executed by several of the grantors, though not by them all, and not recorded, may be read in evidence.

A WARRANT to Hugh Pugh for 200 acres of land, dated 20th August, 1765, adjoining lands of William Allen, esq., James Logan, and vacant land, including his improvement in Lower Smithfield township, was shown in evidence on the part of the defendant. He then produced a survey for 253 acres of land in the same township, and adjoining the lands of William Allen and James Logan above mentioned, but said to be made in pursuance of a warrant to Pugh, dated 21st August, 1765, the reading whereof was excepted to until the warrant of the 21st August should be produced. The defendant then showed a certificate of the surveyor general that no warrant of the 21st August, 1765, to Pugh, could be found in his office.

By the Court. The survey is good, and legal evidence to be judged of by the jury. A presumption arises that it was made under the warrant of the 20th August, by the lines corresponding with the terms of the warrant; and this is considerably strengthened from the certificate that there is no warrant of the 21st August to be found. The mistake was probably made by the deputy surveyor, *currente calamo*.

It was also ruled by the Court that a deed proved to be executed by several of the grantors, though not by them all, and not recorded, might be read in evidence, and that this had been frequently resolved before.

Verdict *pro defdte*.

Messrs. Sitgreaves and Thomas, *pro quer*.

Messrs. Ingersoll and Wm. Smith, *pro def*.

AT NISI PRIUS, AT WILKESBARRE,
MAY ASSIZES, 1792.

CORAM M'KEAN, CHIEF JUSTICE, AND YEATES.

THOMAS WRIGHT vs. JOHN QUINN.

The act of assembly of 2d January, 1778, as to the arresting of enlisted soldiers is in full force; but this act does not relate to judicial process.

A MOTION was made by Mr. Daniel Smith to discharge John Quinn, a soldier enlisted by Captain John Cook, in the service of the United States, from his confinement, under the act of assembly of 2d January, 1778. It appeared that he had been arrested under the warrant of John Paul Schot, esq., a justice of the peace, at the suit of Thomas Wright, after his enlistment, and that the justice had given judgment and issued execution against him for 56s debt and 6s 6d costs, under which he was confined.

He was now brought up by rule of Court, and the agent of the creditor directed to attend.

Mr. Hall, on the part of the creditor, objected to the discharge. He contended, that the reasons contained in the preamble of the act ceased to operate. America is now at peace with Great Britain, and the object of the present war is merely to quell the incursions and ravages of a few restless savages. Besides, that act speaks of soldiers enlisted in the service of this or any other of the United States; and moreover the operations of the federal government must be supposed virtually to have repealed this law. The present matter is to be considered as a dispute between the federal government and the creditor, which ought to be determined only in the Federal Courts.

But, *by the Court*, it was found expedient for the common welfare, to supersede the interests of individuals who claimed debts of soldiers, to a certain amount. The resolve of congress of the 26th December, 1775, declares that no soldier shall be arrested for a debt under thirty-five dollars. The act of assembly of 2d January, 1778, raises it to fifty dollars, the former sum having been thought inadequate to the object in view. When this law was passed, each state furnished its own quota of troops. Under the present federal government the United States at large raise the army. America was then engaged in a war with Great

Britain, but though this is not now the case, yet the reason of the law still subsists, though not in so strong a degree as at that period. It is, however, of the utmost consequence, that the enlistments of the troops now intended to be raised, should be completed. The general enacting words of the act cannot be controlled by the preamble, nor are they restricted by any subsequent clause. The articles of war, which are now incorporated into the general system of the Union, by the act of congress passed the 30th day of April, 1790, give a power to officers to *detain* soldiers not owing the sum of thirty-five dollars; and there is nothing that we know of in the federal government which repeals or alters this resolve of congress either expressly or virtually.

The act of assembly of January, 1778, must therefore be considered in full force. But this does not relate to judicial process, which on the face of it ascertains the plaintiff's demand. The soldier here having been arrested by mesne process, after he was enlisted, is within the words of the act, and unless that arrest was legal, the subsequent proceedings cannot be supported. The soldier and creditor are citizens of the same state, and the case is certainly cognizable before us.

We are therefore of opinion that the soldier be discharged, but strongly recommend that he should give an order on his officer for ten shillings per month, to be stopped out of his pay, until the debt and costs are discharged. This was accordingly done, and the order accepted by Captain Cook, in open Court.

AT NISI PRIUS, AT SUNBURY,

MAY ASSIZES, 1792.

CORAM M'KEAN, CHIEF JUSTICE, AND YEATES.

LESSEE OF CORNELIUS COX *vs.* THOMAS GRANT, Esq.

The sale of lands by county commissioners, where there is sufficient personal property to be found on the premises to pay the taxes, is void, and their deed a mere nullity. Courts of justice will examine such sales narrowly. The person in whose name a warrant or location is taken out, is a trustee for him who entered it and paid the moneys.

EJECTMENT for three hundred acres of land in Shamokin township. Defense taken for one undivided moiety. The plaintiff and defendant both claimed under the same location, entered in the name of Thomas Grant, dated 3d April, 1769, and drawn in

the land lottery directed by the governor, No. 1688. It appeared in evidence that the location was put into the office by Alexander Grant, the father of the defendant, in his name, and that he was then eleven years old; that the lands were taken up by the said Alexander and Cornelius, in partnership, and that some time afterwards, during the minority of the son, the former agreed to sell to the latter the other moiety of the land for 20%, and received from him part of the consideration in whisky and salt; that the said Cornelius put a tenant on the land, who continued several years quietly in possession, and though the said Alexander frequently saw him on the premises, he never disturbed him in his possession, nor laid any claim to the land. The said Cornelius paid the surveying fees, and obtained a deed poll on the location from one Thomas Grant, of New York. Alexander Grant, in 1772, entered a *caveat* in the secretary's office against Cox obtaining a patent, alleging that the real applier had not conveyed the location. The said Alexander obtained a judgment in Northumberland county against the said Cornelius, for 9*l.* 8*s.* 8*d.*, issued a *fi fa.*, returnable to August term, 1773, upon which these lands were levied as Cox's property. On the 9th December, 1782, the county commissioners conveyed by deed these lands to the defendant, the same having been also seized as the property of the plaintiff, for a small tax, in consideration of 15*l.* 10*s.*, though there was at the time much more personal property on the premises than would have been sufficient to have discharged the taxes. The defendant got into possession, and afterwards, on 25th March, 1788, obtained a patent for the lands.

The counsel on both sides declined speaking to the facts, and submitted the law to the decision of the Court, who declared, without difficulty, that the plaintiff was entitled to a verdict.

The Court said the commissioners' sale could not possibly divest the plaintiff of his lands, there being sufficient personal property on the premises to pay the taxes, which ought to have been distrained on in the first instance. Their deed, therefore, was a mere nullity, and conveyed no title whatever. It was the duty of Courts of justice to examine such sales narrowly, and if they did not appear to be strictly conformable to law, to pass the merited censure on them. But this sale of the commissioners, as well as the sheriff levying on these lands, at the suit of the defendant's father, and during his minority, operated very materially against the title of the defendant. The right of the plaintiff to the lands in controversy, was affirmed by the defendant personally, in purchasing them at the commissioners'

sales, and by the father, who must at least be considered as the agent of the son, in permitting the sheriff to levy upon them, in his suit against Cox.

But independent of these peculiar marked circumstances, we must take notice of the usual practise which has prevailed in the country, to obtain a title to lands from the late proprietary offices. The rule which obtained amongst them, that a person should not be permitted to take out a warrant or location for more than 300 acres of land, was probably first introduced to prevent the engrossing of real property, and was perhaps continued afterwards for the emolument of the officers. But we well know, that in general, the name in the location was merely nominal, and used as a kind of scaffolding for the building up a formal and regular title. The person whose name was used, stands as a mere trustee for him who took out the warrant or entered the location, and paid the surveyor and other officers. The latter is the *cestui que use*. It has been long settled, that one purchasing lands in the name of another, and paying the money, it is a resulting trust. Vide 1 Wms. 321. 1 Wils. 21. 1 Equ. Cas. Abr. 380. 2 Equ. Cas. Abr. 744. 1 Atky. 60. 2 Atky. 150. Here Alexander Grant made use of his son's name, merely for the purpose of obtaining the title, and having sold to the plaintiff, his sale must be established.

The lessor of the plaintiff hereupon agreed to pay the defendant the purchase money, interest and fees of patenting the lands, upon his conveyance of the patent right to him; and the jury, without leaving the bar, found a verdict for the plaintiff, with six pence damages and six pence costs.

Messrs. Duncan, Kittera, and Daniel Smith, *pro quer.*

Messrs. Ingersol and C. Smith, *pro def.*

AT NISI PRIUS, AT HARRISBURG,
MAY ASSIZES, 1792.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

ARTHUR CHAMBERS *vs.* DANIEL FURRY and CHRISTIAN FURRY.

Same *vs.* Same.

In a highway, the right of passage belongs to the public, but the right to the soil, the stones, wood, or grass, continues in the owners of the lands.

There is no custom to land or receive freights on another's freehold on the banks of a navigable stream without his consent.

THESE were two actions of trespass *quare clausum fregit*, for landing wagons, horses, and passengers on the plaintiff's freehold in Paxtang township, on the east side of the river Susquehanna, from the defendants' flats, and for receiving wagons, horses, and passengers, on board the said flats from the said close.

The plaintiff showed title to the *locus in quo*, under a deed dated 30th November, 1785, from John Eppele, and wife, and Sophia Eppele, his mother, to the said plaintiff, in consideration of 120*l.* of a parcel of land, extending — perches on the east side of the said river, and the width of two perches from high water mark, and of four perches from low water mark, and of the old ferry (called Teaff's), belonging to the farm whereon the grantors lived.

The plaintiff proved the trespasses in both cases, and it was then admitted that the defendants had received ferriages from persons crossing the said river, who were landed within and also taken from the supposed freehold of the plaintiff.

The defendants contended: 1st, That the place where the supposed trespass was committed, was a public highway. 2d, That every person had a right to land on, or receive property from, the banks of a navigable river. 3d, That possession of this privilege had been had by those under whom they held their lands on the west side of Susquehanna for fifty years, and a right must therefore be presumed from so considerable a length of time.

The first ground was given up on its appearing to the jury, who had viewed the road in the presence of a shower mutually agreed to, that the public highway was laid out at some perches distance from where the boats landed or received their freight.

On the second point were cited 1 Ld. Raym. 725. Every man of common right may justify the going of his servants, or of his horses, upon the banks of navigable rivers, &c., to whomever the right of the soil belongs. 1 Burr. 292. A jury found, after a second new trial, that all persons whose occasions led them to navigate the river Tees, which divides Yorkshire from the county palatine of Durham, had a right to a track-path on each side of the river for the convenience of towing, without let or hindrance from the owner of the soil. Dougl. 425 to 429. The right to the soil of a navigable river belongs, by presumption of law, to the king, and not to the owners of the adjoining lands.

On the third ground of defense evidence was given, that upwards of thirty years ago ferries were kept on both sides of the river, and boats received their freights and landed on the opposite shores without molestation or hindrance, the owners on each side permitting those on the other side to enjoy the benefit of their respective landings. That Michael Teaf first kept the ferry on the east side of Susquehanna (where John Eppele, who conveyed the lands to the plaintiff, now lives) and Marcus Huling on the western side, where the defendants lately dwelt; and that they and their successors were never disturbed in landing or receiving wagons, horses, or passengers, on board their flats on the opposite shore, until the year 1785, when the plaintiff purchased the landing from Eppele, and forbade the defendants and their boatmen from landing on his shore.

The defendants' counsel further cited 3 Term Rep. 262, where Lord Kenyon says that small evidence of usage before a jury will establish a right by custom, on the ground of public convenience.

The plaintiff's counsel contended that it had been settled, in a late case (*Ball vs. Herbert*, 3 Term Rep. 260), that the public were not entitled to the use of the banks of navigable rivers, at common law. That the case in 1 Ld. Raym. 725, was considered as inaccurate and of no authority. 3 Term Rep. 261, 262, 263. And that no prescriptive right could be set up in Pennsylvania to the use of the banks of the Susquehanna, which was first established a highway by act of assembly, passed 9th March, 1771, as to the purposes of navigation up and down the same. On the contrary, the different acts of assembly which had passed since the late revolution, vesting ferries in particular persons, evinced the uniform idea of the legislature to have been, that to entitle a person to keep such ferry, he must either

hold the grounds where the landing is made, or obtain the consent of the owners of the lands for that purpose. The law passed 11th March, 1784, giving John Sumral a right to a ferry over Youghiogeny, contains this clause: "provided always, that nothing contained in this act shall be construed to vest a right in the said John Sumral, his heirs or assigns, to land any boat or boats, upon any landing belonging to any other person or persons, without their consent first had and obtained." 2 State Laws, 283.

So of the act passed the same day vesting a ferry over Monongahelah in John Ormsby. Ibid, 284.

So of the act passed 8th September, 1787, vesting a ferry over Schuylkill, near Spring Mill, in Peter Le Gaux. 3 State Laws, 315.

So of the act passed 28th March, 1791, vesting a ferry over Swatara, in Christian Seltzer. Loose Laws, p. 23.

By the Court. There can be no doubt but the plaintiff is entitled to recover in both suits. The plaintiff complains of an injury done to him in his freehold, and has fully proved his case. How, then, do the defendants justify themselves?

Their first plea set up, that the place where the supposed trespass was committed was a public highway, has been abandoned. The facts would not warrant it. But had it been a highway, would it have been a justification? The public would, in that case, have been entitled to a *right of passage*, but the title to the soil, the stones, the wood or the grass growing thereon, would have still continued in the owner of the lands. The use of the ground would be dedicated to the public for particular purposes only. The books lay it down that, in England, the right to the bed of a navigable river is presumed to belong to the crown, and, of course, in such case here, to the commonwealth, *usque ad flum aquas*; but the right to the adjoining land rests in the owner of the soil. Hence, arises the right to wharves in the city of Philadelphia, and commercial ports. No one can use them without making compensation to the respective proprietors.

The case in 1 Burr. 292, depended on a right founded on immemorial usage to a track path on each side of the river Tees. In the case in Dougl. 425, the right of the mayor and commonalty of the city of London to make the horse-towing path on the soil of the river Thames, was derived under powers vested in them by the statute of 14 Geo. 3, cap. 91, and 17 Geo. 3, cap. 18.

The defendants cannot ground their right to land or receive freights on another person's freehold upon any custom, for none such exists. The late proprietaries claimed, a right by way of prerogative, to grant patents for ferries; but they never pretended this claim where the patentee was not possessed of lands on both sides of the water, or, at least, had not the permission of the owners of the landings. The acts of the legislature in the instances cited by the plaintiff's counsel, strongly negative the idea that a person may trespass on the property of his neighbor with impunity, even by landing his boats on the rocks of an opposite shore, the freehold of another. The judgment on the demurrer in 3 Term Rep. 260, fully establishes the doctrine which must govern this case on the principles of the common law.

The usage set up by the defendant, as to this ferry, will not operate as a good ground of defense. While the holders of the ferries on each side of the river enjoyed the mutual advantage of landing on each other's shore, each derived a benefit from the permission of his opposite neighbor. A reciprocity of indulgence and good offices was advantageous and necessary on both hands; but this was obligatory on neither, longer than they thought proper, or deemed it convenient. Therefore, when Eppele discontinued the *old* ferry, and sold his landing to the plaintiff, whose *new* ferry lay lower down the river, as the plaintiff, his assignee, could receive no benefit from the landing on the opposite shore, he was under no moral or equitable obligation to continue a license originally founded on mutual advantage. The plaintiff determined this license by forbidding the defendants and their boatmen from landing on his shore, and they persisting after such notice, are guilty of a trespass, for which they must make reparation in damages.

The suits being brought to try the right of the defendants to land and receive freights on the plaintiff's shore, it was then agreed that the jury should give a verdict for the plaintiff, with six pence damages, and six pence costs, which was done accordingly.

Messrs. Ingersoll, C. Smith, and Henry, *pro quer.*

Messrs. Duncan, Kittera, and Hanna, *pro def.*

Lessee of THOMAS WELCH, ROBERT WELCH, and JOSEPH WELCH
vs. PETER BAKER and JOHN LUDWIG.

Quere, whether a plaintiff may pocket his *distringas*, and whether he is compellable to pay the costs of the term, before the action is continued, when he will not try it? Court will not oblige the plaintiff in such case to agree to the taking of depositions to be read in evidence at all events.

MR. INGERSOLL, for the defendants, moved that the cause of the plaintiff should not be postponed, unless the costs of the term were paid, and cited Dallas, 29, *Keppele vs. Williams*, that it would be a contempt to pocket the *venire facias*.

MR. C. Smith, for the plaintiff, urged that, there being no proviso rule, and the *distringas* being the plaintiff's writ and considered to be in his possession only, he was not compellable to pay costs in the first instance, and the Court would not impose such terms on him.

M^r.Kean, C. J., was of opinion that the plaintiff could not pocket his *distringas* without the leave of the Court, and that previous to the continuance of the suit by the plaintiff, after his giving notice of trial, the defendants might insist on his paying the costs of the term.

Yeates, J. I do not think that the Court will compel the plaintiff to file his *distringas* against his consent (see 3 Mod., 245, 246); and it has been ruled at Nisi Prius, at Carlisle, in Seely's lessee vs. Gregory, that even after a rule for trial by proviso obtained, where the defendant neglected to issue his *distringas* by proviso, and the plaintiff took out his *distringas*, that the plaintiff was not obliged to file his *distringas*. [May Assizes, 1787.] The only question seems to be, whether the costs should be paid previous to the cause going off. As to the rule in such case, that the plaintiff should pay the costs of the term, it appears to be a matter of course; it may be enforced by attachment, and the Court, on application of the defendants, would probably stop further proceedings, until the rule was complied with. But I have never known it to be the practise to require the payment of the costs in the first instance as a term on the plaintiff, before a proviso rule taken. Until such rule had, or a rule for trial or *non pros*, the defendants, by the policy of the law, have not the cause in their possession.

The defendants' counsel then moved that the action should not be permitted to go off, unless the plaintiff would agree to the taking of the depositions of certain witnesses then attending, and that the same should be read in evidence at the trial at all events.

But the Court declared that the defendants, not having the cause in their power, they could not impose terms on the plaintiff; yet they recommended to the plaintiff's counsel to agree to a reasonable and equitable rule, as to the taking of the depositions required, which was afterwards agreed to by mutual consent, the depositions so taken to be read in evidence on the common terms.

AT NISI PRIUS, AT READING,

MAY ASSIZES, 1792.

CORAM, M'KEAN, CHIEF JUSTICE, AND YEATES.

JAMES EVANS, executor of NATHAN EVANS, *vs.* THOMAS JONES and wife, late MARY NICHOLAS, administratrix of THOMAS NICHOLAS, and terre-tenant.

The recording of a mortgage is a constructive notice to all the world. It is not absolutely necessary that mortgagees should have the possession of title deeds; but when, after the execution of a mortgage, and before the same is recorded, a sum is borrowed from a second mortgagee, on the strength of the title papers, without notice of the first mortgage, the first mortgage, perhaps, will be posted postponed.

SOIRE FACIAS *sur* mortgage to testator, dated 11th August, 1759, for securing the payment of 100*l.* on the 27th September, 1775, regularly recorded. The defendants pleaded payment, with leave to give the special matters in evidence.

The defense set up (besides the length of time, which was not much insisted on at the trial), was that the mortgagee never had the possession of the title deeds of the lands, or, if he ever was possessed of them, that he had given them up to the mortgagor or his administratrix (who was his daughter); and that, by reason thereof, the lands had been appraised at their full value under an order of the Orphans' Court, and had been vested by three different mesne conveyances in Peter Plank, the terre-tenant, who now produced the title deeds.

The defendants' counsel insisted that here was a legal deception, and that the plaintiff's mortgage ought not to prevail against the terre-tenant, who had purchased fairly, without notice of the incumbrance. They cited 9 Mod., 37. One having a title to lands, and not giving notice to a purchaser, it is fraudulent; and this holds even in the case of infants and *femes covert*. 2 Atky., 49. A mortgagee being present, and giving no notice of his incumbrance at the time of the making of a marriage settlement,

he shall be postponed. 1 Cha. Rep. 60. S. P. 3 Wms. 281. The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor, showing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds, the first mortgagee is accessory to the drawing in of the second. 1 Wms. 394. Mortgagee of a ship by deed, intrusts the mortgagor with the original bill of sale, and the mortgagor indorses thereupon subsequent mortgages or bills of sale of several parts of the ship, and the mortgagee acquiesces, this is evidence of an assent in such mortgagee, and shall, therefore, postpone him.

On the part of the plaintiff, was cited the resolution of the Court in the case of *Levinz vs. Will*. Dallas, 435. "The recording of a mortgage amounts to a *constructive* notice to all men, and supersedes the necessity of *express* personal notice."

Per Curiam. This matter has already been settled in effect, by the solemn decision of the Supreme Court in the case quoted by the plaintiff's counsel. In Pennsylvania, "any one, by having recourse to the offices of the recorders, may ascertain the previous liens upon the property which he wishes to purchase." The records are constructive notices to all mankind. We still adhere to that opinion. Our situation is very different from that of England, as to transferring or mortgaging landed property. There, by a general statute (27 Hen. 8 c. 16), bargains and sales alone by deed indented, must be enrolled within six months in one of the Courts of Westminster Hall, or with the *custos rotulorum* of the county. 2 Black. Com. 338. In the counties of York and Middlesex, and some other provincial divisions, special acts of Parliament have directed the registry of deeds and wills in their several districts; but it is confined to them alone. Ibid, 343. It is not to be wondered at, that, in England, the circumstance of the mortgagee having the title deeds in his hands should be deemed of consequence, where the alienation or incumbrances are secret. There, purchasers or creditors cannot know, with any absolute certainty, what the estate, and the title to it, in reality, are, upon which they are to lay out or lend their money. 2 Black. Com. 342.

But it is not so, here. The law directs that mortgages shall be recorded within six months, and any man may discover the incumbrances, if he will take the trouble of searching the proper offices. If he will not, he must impute the consequences to his own laches. *Vigilantibus non dormientibus leges subserviunt*. Besides, it is not a general custom in this government for mort-

gagees to receive the possession of title deeds. It may be done, in some instances, by very prudent persons, who lend out money, *ex abundanti cautela*, but it is far from being generally practised.

The chief justice, in the course of the trial, said: In one case only, can the mortgagee be affected by suffering the title deeds to remain in the hands of the mortgagor; and that is, where, after the execution of the mortgage, and before the same is recorded, the mortgagor, on the strength of the title papers in his hands, borrows money on a second mortgage. If this second loan was made without knowledge of the first incumbrance, and before the first mortgage was put into the recorder's office, there I should apprehend the first mortgagee should be postponed.

Messrs. W. Smith and Marks Biddle, *pro quer.*

Messrs. Clymer and Read, *pro def.*

Verdict *pro quer.* by consent, for 200*l.*

Vide 2 Brown's Cha. Rep. 650. Mortgagee of a reversion not having the title deeds, shall not be postponed to another mortgagee (whose mortgage was made after mortgagor came into possession) who has the title deeds, there being neither fraud nor gross negligence.

SEPTEMBER TERM, 1792.

PRESENT — M'KEAN, CHIEF JUSTICE,— SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

JOHN VAUGHAN and PETER JANUARY, assignees of JOHN NANCARROW,
vs. JOHN D. BLANCHARD and THOMAS RUSSEL.

Depositions of witnesses taken under a commission allowed to be given in evidence, though it did not appear that they were sworn by the commissioners. Court will not direct a nonsuit, though the evidence is not very clear with the plaintiff. Where a landlord claims and uses certain privileges, against the tenant's consent, it is incumbent on him to show that he reserved them; otherwise he suspends the rent.

THIS was an action of debt for 65*l.*, for one half year's rent of a house and cellar in the city of Philadelphia, under a parol lease, brought by the assignees of Nancarrow, who was discharged under the insolvent act. The plaintiffs averred, in their declaration, that Nancarrow held the property as tenant for a term of years, under a demise from Mrs. Ann Pemberton, and, being so possessed, leased the same to the defendant for the residue of the term, at the rent of 180*l.* per annum.

A commission issued to Kentucky to take the testimony of one James Edwards, and his answers returned to the interrogatories, were offered in evidence by the plaintiffs. The defendants excepted thereto, alleging that it appeared by the return of the commission that the commissioners had not administered the oath to him, who were the only persons delegated and authorized by the Court for that purpose, and that the said Edwards appeared to have been sworn before a justice of peace, without mentioning his name, or any certificate transmitted of his being in the commission of the peace; but the Court overruled the objection. It is stated by the commissioners that the witness was duly sworn by a justice of the peace, and it may fairly be presumed to have been done in their presence; *omnia præsuntur legitime facta, donec probetur in contrarium.* (1 Co. Lit., 232.)

The answers to the interrogatories were, therefore, read, and the plaintiffs having closed their testimony, the defendants' counsel moved for a nonsuit, contending that as the plaintiffs had stated the circumstances of Nancarrow's title in their declaration, the same ought to be proved, and cited Dougl., 643.

The Court ruled that there was evidence given by Edwards

in his answers to the interrogatories as to this point, though it did not fully appear, from the wording thereof, whether he knew the fact of his own knowledge, or collected it from hearsay. It was, however, testimony to that point, of which the jury were the proper judges, and, therefore, the direction of the nonsuit was refused.

It was shown, by the testimony adduced by the defendants, that Nancarrow had, some time after his leasing the premises to the defendants, claimed a right of passage through the cellar leased to another cellar back, though he had other communications thereto, and had actually used this privilege against their will and consent. The Court were of opinion that it was incumbent on the plaintiffs to show in evidence the reservation of this privilege; otherwise, the said Nancarrow had, by his own act, suspended the rent, and cited Gilb. Law of Evid., 283. If the lessor enter into part the whole rent is suspended; for the lessor cannot apportion it by a wrongful act of his own.

Verdict for the defendants.

Messrs. Rawle and Heatly, *pro quer.*

Messrs. Ingersol and Sergeant, *pro def.*

JOHN SHAW, indorsee of MICHAEL CONOR, *vs.* SAMUEL WALLIS.

Application for a rule for security for costs, in the case of a foreign plaintiff, is never too late, unless it goes to procure delay.

THIS cause having been put on the list of issues to be tried by a struck jury, the plaintiff now declined trying the same, whereupon the defendant moved for a rule for security for costs, the plaintiff living out of the state.

This was opposed by the plaintiff's counsel, who alleged that such a rule could not legally be granted, and more particularly at this late stage of the cause.

The Court declared that the more modern authorities warranted the entering of such a rule. (1 Term Rep., 267, 362; 4 Burr., 1177; 2 Term Rep., 491.)

There is a much stronger necessity for this practise in Pennsylvania than in England, where the parties regularly pay for the services of the different officers as they proceed in the suit. The application for such a rule is never too late, unless it goes

to procure delay; as if the plaintiff was ready now to try the action. and the defendant had moved for the rule at this term previous to the trial, there the Court would reject the application; but as the plaintiff will not, in the principal case, be delayed, the rule must be entered, that the plaintiff do give security for costs by the next term, or *non pros*.

Mr. Moylan, *pro quer*.

Mr. S. Levy, *pro def*.

PRESENT,* SHIPPEN, YEATES, AND BRADFORD, JUSTICES.

WILLIAM WOOD vs. GEORGE ROACH AND JAMES CRAWFORD, GARNISHEES OF JAMES ELLIOT.

A bill of lading not signed, but kept by the captain for his own use, is no evidence to show that goods were shipped, and a bill of lading signed.

On a plea of *nulla bona* to a foreign attachment with leave to give the special matter in evidence, written notice having been given that the defendant would insist on the non-payment or tender of freight of the goods shipped, it may be given in evidence without pleading the cause of detainer specially. Goods may be stopped by the shipper in transitu, only where they have not been paid for, or the party is insolvent, but not when they have been shipped to pay a precedent debt.

SCIRE FACIAS *sur* foreign attachment. Plea *nulla bona*, with leave to give the special matters in evidence.

The defendants rested their defence on two points: 1. That the goods attached having been laden on board the ship Alexander, whereof George Roach, one of the defendants, was master, previous to the attachment, were tacitly obliged for the freight, and, as it were, bailed for that purpose. Beawes' Lex Mercat. 112; Moll. lib. 2, c. 4, § 9; Ib. lib. 2, c. 3, § 19; 2 Equ. Cas. Abr. 98, pl. 1; 3 Bac. Abr. 598; 2 Bac. Abr. 352.

2. That one Robert Elliot, in Ireland, had a prior legal title to the plaintiff in the attachment; a bill of lading having been signed by the captain on the receipt of the goods on board, and the shipment having been made by James Elliot in consequence of a precedent debt, due from James to Robert Elliot. They cited to this point 1 Term Rep. 209; 1 Stra. 165; 4 Burr. 2238.

It was also insisted, that the captain should have been indemnified, previous to the attachment executed.

To prove the signing of the bill of lading previous to the attachment, a copy of the bill of lading, not subscribed by Capt.

*The chief justice was confined at home, by indisposition, during the remainder of the term.

Roach, but kept by him for his own government, dated 29th October, 1787, with his affidavit annexed, taken on the 1st December, 1787, that he had signed two bills of lading of the same tenor and date, prior to the laying of the attachment by the plaintiff, were offered in evidence by the defendant's counsel, and objected to by the plaintiff.

The Court, on argument, overruled the evidence; it being the mere oath of the captain, who was one of the defendants, and therefore a copy not duly approved, and the defendants after so great a length of time having had it in their power to procure by a commission one of the original bills, or a copy thereof, taken by some indifferent person.

The plaintiff contended, that it would be extremely unreasonable to demand the full freight of goods on their being merely put on board, upon the service of an attachment. Freight was not due until the ship had broke ground. *Beawes*, 110; *Mol. lib. 2, c. 4, § 4*. Besides, whatever might be the jury's idea of the freight, they might deduct it from the value of the property attached, and it would go in mitigation of the sum.

There was no occasion for an indemnity to Captain Roach, because the sheriff's general bond of office was an adequate security to him; and if the sheriff had levied on or attached goods belonging to another, a complete remedy might be had against him:

Here was no satisfactory evidence of the captains having signed a bill of lading, or of the existence of a precedent debt from James to Robert Elliot. Goods in the hands of a factor are not affected by his bankruptcy. 2 *Espinasse*, 327. Goods in *transitu* may be stopped by the consignor. 1 *Atky.* 245. So may he stop them by a friend before they come to the hands of the consignee in a foreign port. 2 *Term Rep.* 63, 674. 3 *Term Rep.* 119, 783.

The plaintiff also insisted, that if the defendants meant to take advantage of the non-payment or tender of the freight, they should have pleaded it, and likened it to the case of a horse attached, where an innkeeper *may* plead his detainer for horse feed. *Law Corpora.* 245.

To this last objection the defendant's counsel replied, that under the leave to give special matters in evidence, they had given written notice, pursuant to the rules of the Court, that they meant to insist on the non-payment or tender of the freight

of the goods attached as one of the grounds of their defense, which was equivalent to pleading of the same.

The proof of the captain having signed a bill of lading of the goods shipped on account of Robert Elliot, and especially of the existence of a preceding debt from James to Robert Elliot, turned out on the evidence to be extremely defective. It also appeared that the freight of the goods had been paid in Ireland, and Captain Roach and the owners had been indemnified by Robert Elliot against the present suit.

The Court, on the point of pleading, declared their opinion, that, as written notice had been given of the defendants' intention to avail themselves of the non-payment of the freight on service of the attachment, which fully prevented all surprise, and the same had not been excepted to, this matter could not now be insisted on; but they did not declare their sentiments, whether in strictness this cause of detainer should have been specially pleaded.

The freight had been paid, and the captain and owners of the ship had been actually indemnified in Ireland against the event of the present action; in fact, the real contest now was between the plaintiff and Robert Elliot, who claimed the property attached.

The leading facts to ascertain whose property the goods were, were comprised under three heads: 1st, Were the bills of lading signed by Captain Roach prior to the attachment? 2d, Were the goods shipped by James Elliot on account of Robert Elliot? And, 3d, Was there a *bona fide* preceding debt due?

On the solution of these three questions, the merits of the present cause rested. If the jury were clearly satisfied from the evidence and the whole circumstances of the case, in the affirmative of those questions, then the property of the goods was vested in Robert, and in that case the attachment would not lie, for goods may be stopped by the shipper in *transitu* only where they have not been paid for or the party is insolvent, but not where they have been shipped to pay a precedent debt. If the jury were not so satisfied, then the verdict should pass for the plaintiff.

Verdict for the plaintiff, that the defendants have goods in their hands, which the jurors appraise at 66*l.* 3*s.*

Messrs. Sergeant and Todd, *pro. quer.*

Mr. Mbylan, *pro def.*

JOHN JOHN *vs.* WILLIAM NICHOLLS.

The governor, and not the corporation of the city of Philadelphia, has the power of appointment of the clerk of the City Court.

THIS cause came before the Court on a case stated, and the only question was, whether the governor of the commonwealth, or the corporation of the city of Philadelphia, have the power of appointment of the clerk of the City Court.

It had been argued, last term, by Mr. Ingersol, attorney general for the plaintiff, and by Mr. Tilghman, for the defendant.

On the part of the city, two points had been made: 1st, The corporation acquire their right of appointment as incidental to their corporate capacity. 2d, It is given to them by express words.

On the first head it was said, that it is incident to the power of a Court appointed by the crown, to appoint a bailiff or sergeant to execute process. 1 Bac. Abr. 565. Cites Rol. Abr. 526. F. pl. 1.

The clerk of a Court is within the same reason. All corporations in England appoint their clerks. An incidental officer may be appointed by the principal. 3 Bac. Abr. 721. Justices of Courts have always appointed their clerks for two reasons: 1st, Because they are best able to make the appointments. 2d, The clerk enters the Court's judgments and keeps their records. The king cannot grant the office of the county clerk, for it belongs to the sheriff. 2 Inst. 425. 3 Bac. Abr. 721. It is obvious that corporations are more immediately responsible for the conduct of their officers. Sheriff must appoint the clerk of his County Court. 4 Co. 32, Mitton's case. The office of Exigenter was granted by Queen Mary, and also by Sir Nicholas Bacon, chief justice of C. B., who claimed it by prescription. The office of the queen's patentee was held void. Dy. 175. Anders. 152, Cavendish's case. Sir Rowland Holt was appointed by his brother, Sir John Holt (ch. just.), as chief clerk for enrolling pleas in B. R. A contest arose hereupon between him and the Duke of Grafton, the patentee of the crown. No judgment appears to have been given. Show. Parl. Cas. 11. But the uniform usage since has been, that the chief justice of B. R. hath appointed to this office.

[NOTE.—The case of Sir Rowland Holt was settled by the king's interposition, and Lord Chief Justice Holt made a handsome allowance out of the profits of the office to the young Duke of Grafton. See Lord Holt's Life, 6.]

On the second head it was contended that by the 39th section of the act incorporating the city, p. 36, it is directed, "that for the well governing of the said city, and the ordering the affairs thereof, there shall be such other officers therein, and at such salaries as the mayor, recorder, aldermen, and common council men, in common council assembled, shall direct," which words would reach the present case; and by the 44th section it is declared, that "the constructions on the act shall be favorable to the powers of the city." The right of making by-laws is incidental to a corporation, though the power is not expressly given; but when the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter. 2 P. Wms. 209. A charter not prescribing the mode of election of a mayor, the corporation may make a by-law for that purpose. 3 Term Rep. 198. Power of a motion is incidental to a corporation. Doug. 152, 153.

Under the old proprietary charter to the city, the mayor recorder, aldermen, common council men, and town clerk, were, in the first instance, appointed by the instrument, but the corporation have, since their first organization, invariably appointed their clerk.

To this it was answered by the attorney general, in behalf of the commonwealth, that the legal exercise of the present power on the part of the city, must depend on the act of incorporation. The cases in England are not applicable. Here an act of the legislature ascertains the powers of the corporation; they are not founded on immemorial custom and usage, as the cases of the appointment of the Exigenter of C. B., and chief clerk for enrolling pleas in B. R., cited for the city. The corporation derives its existence, power, and authority, from the act of 11th March, 1789.

The words of the 39th section of the act refer to salary officers under the corporation, but cannot be reasonably extended to office of clerk of the City Court, who must, from the nature of his office in a populous city, transact more business respecting *public offenses* than any county clerk. He is, in the city, what the sessions clerk is in each county. The governor, by the constitution of 2d September, 1790, is considered as the depository of the executive power, unless otherwise appropriated; an *express exception* must appear in the present instance, otherwise the power of appointment must devolve on the governor. But no such exception does appear in the act of incorporation of the city; and no necessity exists for the appointment by the cor-

poration, when the governor can constitutionally exercise that power. Wherefore, &c.

The decision of the cause stood over until this term; and now Shippen, J., delivered the opinion of the Court, as follows:—

The sole question in this case is, whether the governor, or the corporation of the city of Philadelphia, has the power of appointment of the clerk of the City Court?

It rests on the true construction of the act of assembly of 11th March, 1789, incorporating the city, and of the state constitution, agreed to in convention, on the 2d September, 1790.

By the old constitution of 1776, section 20, the supreme executive council had the right of appointing all officers, civil and military, unless those chosen by the legislature, or reserved to the people at large. The act of assembly of the 4th April, 1785, confirms this right in express words, in pursuance of a previous resolve of the council of censors. Under the act of 14th March, 1777, the powers of the mayor, recorder, and aldermen, were vested in three justices of the city, and the supreme executive council appointed the clerk of the City Court. It therefore appears evident to us, that unless an exception *plainly* appears, the right of appointment is vested in the governor, as the supreme executive power.

By the second article of the constitution of 1790, section 8, the governor is to appoint all officers, whose offices are thereby established, or which shall be established by law, not otherwise specially provided for. By the act incorporating the city, section 39, it is declared, "that for the well governing of the said city, and the ordering the affairs thereof, there shall be such other officers therein, and at such salaries, or other compensation, as the mayor, recorder, aldermen, and common council men, in common council assembled, shall direct." This clause, it is contended, vests the right of appointing the city clerk in the corporation at large; but it evidently relates to officers necessary for the conducting and management of the *corporation* and the *internal police* of the city; and to salary officers who shall receive a compensation stipulated by the common council for their services. The section cannot, in our idea, apply to the office of clerk of the City Court, whose duties in the city must be analogous to those of the clerks of the sessions, in each county, in the state. Nor can we find that any clause in the act incorporating the city, gives the corporation the power of appointing the city clerk. Our opinion, therefore, is, that such power rests with the governor, agreeably to the true spirit of the constitution.

Judgment *pro quer.*

MARY WHITE et al., executors, vs. CHARLES HAMILTON.

W recovers judgment against H, in the Supreme Court, on a removal from Philadelphia county, and H afterwards sells lands in Lancaster county to I, and then becomes a bankrupt; the lands may be taken in execution at the suit of W, on a *testatum & fa.*, the bankrupt laws not operating on lands conveyed anterior to the bankruptcy.

A judgment in the Supreme Court upon removals from the proper county binds defendants' lands throughout the state.

A QUESTION arose, whether an execution could be served on the lands of the defendant, a bankrupt, on the following facts:—

The plaintiffs commenced a suit in the Common Pleas of Philadelphia county, against the defendant, and on the removal thereof into the Supreme Court, judgment was obtained 3d April, 1785. The defendant, for a valuable consideration, previous to his bankruptcy, but subsequent to the plaintiff's judgment, sold and conveyed to Abel James certain lands in Lancaster county. The defendant was declared a bankrupt in 1789, but on an issue joined for this purpose between Robert Ralston and William Bell, it was found that he had committed acts of bankruptcy in the month of February, 1788. The plaintiffs issued a *testatum & fa.* to Lancaster county, on which, upon the 7th April, 1788, the sheriff of that county levied on the lands, which the defendant had conveyed to James.

Messrs. Lewis, Sergeant, and Rawle had moved to set aside the execution, contending that it could not be served on the lands of a bankrupt, after an act of bankruptcy committed, and that the bankrupt law, controlled the judgment, no execution having been previously executed.

They were opposed herein by Messrs. Ingersoll and Wilcocks, for the plaintiffs, and upon argument at the last term, the Court were clearly of opinion that, Hamilton having conveyed the lands to James anterior to his bankruptcy, the bankrupt laws could not operate on his property. The lands could not vest in the commissioners, nor the moneys arising therefrom be distributed among the general creditors of the defendant. The lien of the plaintiff's judgment, therefore, continued on the defendant's lands, in the hands of the purchasers. The cases of *Orlebar vs. Fletcher* and the duke of Kent, 1 P. Willms., 737, 739, and *Gibbs vs. Gibbs*, Dallas, 374, were thought decisive as to this point.

Another objection was then made, that the judgment in the Supreme Court, on the removal from Philadelphia county, did not bind lands in Lancaster county. On this head it was said, for the creditors of James, that a cause removed from the County Court partook of its original nature. Judgments in the Supreme Court of Pennsylvania differ from those in the Courts

at Westminster, because there several *elegits* to different counties may be taken out together; but here the practise has uniformly been to issue an execution to the original county, and then proceed by *testatum*.

For the plaintiffs, it was urged that by the act (8 Geo., 1,) for "establishing Courts of Judicature in this province" (Old edit. of Laws, p. 85), it is declared that the justices of the Supreme Court shall exercise the jurisdictions and powers thereby granted, as fully and amply to all intents and purposes whatsoever, as the justices of the Courts of Kings' Bench, Common Pleas, and Exchequer, at Westminster, or any of them, may or can do. In England the lien of judgment is commensurate to the jurisdiction of the several Courts; so, necessarily, must it be here. There one may, upon the judgment roll, immediately after the entry of the judgment, award as many *elegits* into as many several counties as he pleases, and may execute all or any of them, as he thinks fit, and where he pleases. 1 Lil. Abr., 689; Cro. Jac., 246; Imp. Pract. B. R., 348; Id. C. B., 391. *Elegits* can only issue where judgments bind lands. The origin of the practise of issuing *testatums* in the Supreme Court arose from the exposition of the 24th section in the act of 8 Geo., 1, which, perhaps, in strictness should have been confined to the other Courts.

They also suggested that the universal idea entertained by Courts and the professors of the law, has at all times been that such judgments in the Supreme Court, on removals from the proper county, bind the defendant's lands generally, throughout the government.

This was denied by the defendant's counsel; whereupon the Court thought proper to stay giving their opinion until they could themselves have an opportunity of making the necessary inquiries thereupon.

And now Shippen, J., delivered the unanimous opinion of the Court, that such judgments in the Supreme Court, upon removals from the proper county, bind the defendant's lands throughout the whole state, and that this was the general (almost universal) idea of the gentlemen of the bar, as the several judges had discovered, on the most minute inquiry. The act "relating to the securities to be given by sheriffs and coroners," passed 5th March, 1790, is a strongly implied legislative declaration to this point. That act declares, sect. 2, that "sheriffs shall enter into a recognizance before the supreme executive council, or com-

missioners by them appointed, which recognizance shall be in the nature and effect of judgments obtained in the Supreme Court, and shall bind the lands, tenements, and hereditaments, of the said sheriff in the same manner as such judgments, to the amount of the security given; and to prevent injury to purchasers, the same to be filed with the prothonotary of the Supreme Court, who shall cause a docket to be made of the same for the information of parties applying."

Motion of defendant's counsel refused.

ELIZABETH RAPP, for the use of BARBARA SEYBERT *vs.* ISRAEL ELLIOTT.

Coverture of the plaintiff pleaded in abatement, without an affidavit, or probable cause shown, set aside by the Court.

ACTION *sur promissory note*. Plea, coverture.

Mr. Howell, *pro quer.*, obtained a rule to show cause, why the plea of coverture entered in the last vacation should not be set aside, it being a dilatory plea and not verified by affidavit, nor any probable cause shown to the Court to induce them to believe that the fact of it is true, agreeably to the thirty-sixth rule of practise of the Court.

Mr. Todd now showed cause, on behalf of the defendant, and offered to lay before the Court probable grounds of the plaintiff's marriage.

Sed per Cur. You are now too late; the affidavits should have been filed when you pleaded the dilatory plea. This we take to be the spirit and true intent of the rule, and apprehend to be the practise in England, under the stat. 4 and 5 Ann. c. 16, § 11, from which the rule is taken. Vide 3 Burr. 1617. 1 Barnes, 257.

Rule made absolute to set aside the plea, for want of an affidavit.

money out of Court, paying the same over to the creditors of James Budden, and giving security under the direction of the Court to the widow of Richard Budden, for the payment of the annual interest of the money to her."

That rule had not been complied with, and now, Mr. M. Levy, on the affidavit of Susannah Stricker, moved that the money might be paid over to Susannah Budden, the widow of Richard Budden, without giving any security for the same.

He urged that at law, she was clearly entitled thereto, both as surviving administratrix with the will annexed of her late husband, and also as tenant for life of the property, out of which the money arose; and therefore there must be strong equity indeed, to repel her from taking the same.

This equity could only be in the representatives of her son James, or his creditors. But she also is a creditor of her son. She joined in the mortgage as his surety and Stricker's, and therefore, according to Justice Ashurst, having contributed her life estate for their benefit, could maintain an action for money paid. Doug. 133, 134. One partner paying more than his share, may recover in *indebitatus assumpsit*. 2 Black. Rep. 949. One defendant may prosecute a decree in equity against another; as where a surety pays money, the principal must undoubtedly indemnify the surety, and the Court will make that decree over. 2 Vez. 622. If a conveyance had been made of land, the money not paid, as against vendee, his heir, or any claiming under him, as purchaser with notice of this equity, the land may be resorted to. 2 Ves. 622. When there is an absolute conveyance of lands, and part of the purchase money paid, the lands may be followed in the hands of a second or third vendee, when there has been notice. 1 Brown Cha. Rep. 421. A factor has a lien on goods in his custody for the general balance of accounts. 1 Burr. 494, 495. Cross demands should be favored, by deducting the lessor sum from the greater, and liens should be favored being founded in justice. 4 Burr. 2120, 2121. Liens are much favored upon general principles of equity. Kaime's Prin. of Equ. c. 4.

Here the mother is a very meritorious creditor of her children, and abstracted from her claim at law, is entitled to every preference in equity, which this Court can give her.

E contra, Mr. Sergeant, in behalf of the creditors of James Budden, insisted, that the Court would not try the question of Mrs. Budden being a creditor of her son, in this summary mode, upon an *ex parte* affidavit. But admit her to be a creditor. Has she a lien? Has she sued and obtained judgment

against her son's administrators? Other *bona fide* creditors have obtained such judgments, and some of them previous to the sheriff's sale, which would undoubtedly create a lien on the real property. At present, the widow cannot be considered in a stronger light than a mere simple contract creditor, and must therefore wait until the prior judgments are discharged. As late tenant for life of the premises sold, she is entitled to the interest of the surplus during the term of her life, but to no more.

Per Curiam. We can permit Mrs. Susannah Budden to take the surplus money out of Court on no other terms, than giving security under our direction, for the payment of the principal sum after her death to the administrators of her son, for the use of his creditors. In the Common Pleas of Philadelphia county in the case of Whitehill *vs.* Houston's executors, testator mortgaged a house and lot in Philadelphia, and then devised the same to his wife for life, remainder to his son in fee. The son mortgaged the remainder. The premises were sold on a *levari facias* on the first mortgage, and a surplus of near 80% remained after paying the first mortgage and costs. It was there ruled that the second mortgagee, on giving security for the payment of the interest of the surplus to the widow during her life, should take the surplus money out of Court.

THOMAS MORRIS et al. surviving executors of JOHN MORRIS, *vs.*
DANIEL GRIFFITH et al. executors of JAS. M'CONAUGHY.*

M mortgages lands in his life-time, and devises all his real estate to his mother; she devises the mortgaged premises to D for life, with power to dispose thereof by will, and makes her executors residuary devisees, who sell two of the tracts for payment of debts; the sheriff levies on all the lands undisposed of, in payment of the mortgage money, on a judgment on the bond; adjudged that all the lands levied on shall contribute according to the value of the several tracts.

THIS cause came before the Court again, on a motion for the Court's direction that the lands levied on by the sheriff of Chester county should contribute according to the value of the several tracts, to pay off and discharge the debt, interest, and costs in this action.

A *fieri facias* had been issued against the executors of James M'Conaughy, upon which all his landed property, remaining undisposed of, had been levied, and on an inquisition taken before the sheriff, it was found that the rents, issues, and profits thereof would be sufficient to pay the debt and costs within

* *Ante*, p. 9.

seven years. The argument respecting contribution was now had by consent, in the same manner as if the money had been brought into Court.

In behalf of Mary Darlington, the niece of Janet M'Conaughy, to whom the mortgaged premises had been devised by the said Janet for life, with power to dispose thereof by will at her death, it was argued, by Messrs. Ingersol and Sergeant, that every devise of land is specific, and such devisee shall have aid of the personal estate. *Ambl.* 173. A pecuniary legatee shall not have aid of the real estate devised to the heir. 1 *Wms.* 201. Where there is a specific devise of lands, devisee shall never contribute upon an average with the heir at law, while the real assets of the heir are sufficient. 1 *Atky.* 505. 8 *Vin.* 442, pl. 5. A specific devisee of lands is a favorite in equity. 1 *Brown's Parl. Cas.* 213. Where real estate is devised under incumbrance, the devisee shall hold it exonerated out of the real assets descended on the heir, as between the devisee and heir, but not as between him and creditors. 2 *Atky.* 430, 431. Heir to be charged in case of a deficiency of personal assets. *Ibid.* 434. A mortgage on land is considered in equity, merely as a security and pledge for the debt. *Ibid.* 435. 1 *Atky.* 487. *S. P.* 2 *Atky.* 437. And as to the proper application of the funds for payment of a mortgage, equity leaves it just as it was before. One seized in fee of the manors of A and B, mortgages A for 4000*l.*, and, by will, charges all his real estate with payment of his debts, and devises A to C, and B to D, and dies; the devisee of A shall compel the devisee of B to contribute to pay the mortgage money on A. 1 *Wms.* 505, 521.

It was, moreover, strongly urged, that there is a striking distinction between the cases in England and Pennsylvania. There, real estate in general is not considered as assets for payment of debts. The Stat. of 3 and 4 *W. and M.*, c. 14, partially remedies this, in the case of specialty debts. 2 *Atky.* 432. But in this state, matters are put on a broader bottom of substantial justice. Every man's lands here are subject to the payment of his debts, and are to this purpose considered as personal property; such debts are liens on the estates of deceased persons.

The policy of our country forbids any predilection in favor of an heir at law. Now where is the difference between lands being charged by operation at law, and when done by the act of the testator himself? *Vide* 1 *Wms.* 693.

Mrs. Darlington claims, as a specific devisee, the lands devised to her. Her aunt must have intended that she should

take a beneficial and effectual estate therein. She has in no part of her will signified her intention that she should take it *cum onere*. If the testatrix had meant to give her the lands, and that she should pay off the incumbrance of the mortgage, to secure her life estate therein, she would have devised to her the equity of redemption, not the land itself. On the other hand, her residuary devisees are merely entitled to the remainder of her estate undisposed of. They are not specific devisees.

E contra, it was insisted by Messrs. Lewis, Wilcocks, and Tilghman, for the residuary devisees of Janet M'Conaughy, that if the cases cited in behalf of her neice, applied throughout, they showed that the land devised to her, though peculiarly devoted and liable to the payment of that incumbrance, should be wholly exempted from a proportion of the mortgage by which it was bound; which would be too gross to be contended for. The residuary devisees, under Janet M'Conaughy's will, claimed the estate, not as her heirs at law, but as specific devisees, equally with Mrs. Darlington. Such a construction is to be put on her will, as to carry every part of it into execution, if possible. As to the case of Galton *vs.* Hancock, cited for the plaintiffs, it depended on the peculiar penning of the will, and the Lord Chancellor shows the grounds of his opinion in 2 Atky. 435, 438, 439.

The mortgage was the debt of James M'Conaughy, executed by him in his life time. The personal estate of his mother, Janet, was not subject to it, nor any part of her real estate, except what vested in her through her son. Mrs. Darlington is a stranger to James M'Conaughy, and claims the land merely through the bounty of his mother.

Testator charges his real estate which was subject to a mortgage contracted by his ancestor), and also all his personal estate, with his debts and legacies. The mortgage shall be borne by the estate originally liable, not out of his estates; and the executrix having paid it out of the personal estate, shall be repaid the money. 1 Brown's Cha. Rep. 58.

Notwithstanding a charge upon a term for payment of debts, a leasehold estate, purchased by the testator, subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator. 1 Brown's Cha. Rep. 454, 463.

Devisee of fee simple lands, under mortgage, shall not charge the devisee of leasehold lands in contribution, to pay off the mortgage. He must take it *cum onere*. 1 Wms. 793. Testator devised mortgaged lands, subject to the incumbrance, and

charges other part of his estate with payment of his debts, devisee of the mortgaged premises shall not pay the mortgage, being contrary to the intent of the testator; and though he submitted to do it, being an infant, was not allowed so to do. 2 Wms. 386.

When personalty falls short to pay debts, specific legatees shall stand in the place of bond creditors against the heir at law. 3 P. Will. 367.

When bonds exhaust the personal estate, recourse may be had to the heir by specific or pecuniary legatees; but not to another specific devisee. 2 Salk 416. 1 Wms. 678. When the devisees are all volunteers, each stands on his own bottom. Suppose an eviction of the title of one of the devisees, there shall be no contribution; the present case stands precisely on the same ground.

Per Curiam. We are of opinion that all the lands levied on by the sheriff as the property of James M'Conaughy, deceased, shall contribute, according to the value of the several tracts, to pay off and discharge the debt, interest, and costs. We consider real property, in Pennsylvania, as assets for payment of debts, and in case of the deficiency of personal property, to be applied to discharge such debts. It does not appear from the will of Janet M'Conaughy, that her intention was that Mrs. Darlington should take the land devised to her, *cum onere*. It is, however, equally subjected to the payment of a proportion of the debts, with the other lands of James M'Conaughy, remaining undisposed of. Mrs. Darlington claims as a specific devisee; the residuary devisees cannot be considered in the same light. To charge the lands devised to them with a ratable part of the debts, would not disappoint the true intention or meaning of either of the wills; but to charge the tracts devised to Mrs. Darlington, singly, with the payment of the mortgage, would evidently produce that effect, which is not to be admitted, if possible to be avoided. Wherefore the Court awards a contribution of the whole of the lands remaining undisposed of.

JOSEPH GRUBB *vs.* GEORGE M'CULLOUGH, and ISABELLA, his wife, late ISABELLA GRUBB, executrix of THOMAS GRUBB, deceased.

JOHN GRUBB *vs.* same defendants.

THOMAS GRUBB *vs.* same defendants.

JAMES GRUBB *vs.* same defendants.

BENJAMIN GRUBB *vs.* same defendants.

The defendant cannot remove a cause after the auditors have examined the witnesses, though they have not agreed on their report; *a multo fortiori*, where they have agreed on it.

THESE were five different suits, brought for legacies devised to the plaintiffs respectively, under the will of their father, Thomas Grubb, during the late war. Auditors were appointed and struck under the depreciation act, by the Court of Common Pleas of Lancaster county, in May term, 1791, to ascertain the demands of the several plaintiffs; and the different actions were continued under the same rules of reference at the August term, following. The auditors met in pursuance of these rules, and heard the parties and their witnesses, and upon the 16th August, 1791, agreed upon and subscribed their reports, finding for the plaintiffs the sums therein specified to be due in specie; but their reports were not delivered to the Court of Common Pleas until their adjourned Court, on the 9th December, 1791, at which time (either just before or after the delivery of the reports, for the counsel were not agreed herein) the defendants tendered writs of *habeas corpus* in the different suits, which were allowed, and the transcript of the records, with the original reports, sent up to this Court. No continuance of the rules of reference appeared to be entered in November term, 1791.

A motion was now made for *procedendos* in the different causes; which the Court without difficulty granted, and refused to hear the testimony of John Hubley, esq., the prothonotary below, offered by the plaintiffs, to prove the delivery of the reports into the Common Pleas, previous to the tender of the writs of *habeas corpus*.

Per Curiam. It appears from the records that the reports were agreed on and subscribed on the 16th August, 1791. The rules of reference, not being struck off, must be deemed to continue until discharged, either by consent or rule of Court. This

The plaintiff's counsel, on hearing this opinion of the Court, prayed an adjournment of the cause for a few hours, in order to furnish themselves with the necessary evidence ; but the defendant's counsel offering a reference on equitable grounds, the terms were at length closed with, and the jury discharged, by consent, from giving a verdict.

AT NISI PRIUS, AT LANCASTER,
OCTOBER ASSIZES, 1792.

Coram M'KEAN, CHIEF JUSTICE—SHIPPEN AND YEATES,
JUSTICES.

Lessee of ROBERT CAMPBELL *vs.* JOHN SPROAT and ALEXANDER
SNODGRASS.

In ejectment, where plaintiff claims under an article of agreement, and the defendant holds under a previous parol agreement, and possession delivered, and a subsequent deed from the same person, his declarations previous to the article shall not be given in evidence to corroborate the proof of the parol agreement, he being a defendant in the suit.

THE lessor of the plaintiff claimed the lands in question, under an article of agreement dated 24th May, 1788, executed between him and Sproat, one of the defendants (in whom the title was admitted to have been vested), and a possession of the premises delivered to him in pursuance thereof. The defendant, Snodgrass, rested his defense on a parol agreement made early the same day between himself and Sproat, previous to the article of agreement, and a prior possession of the premises delivered to him in pursuance thereof, on which 73*l.* 15*s.* had been tendered to the lessor of the plaintiff to pay off a judgment which he had before obtained against Sproat, and 120*l.* had been paid to Sproat on his bonds, who had conveyed to him the legal title, by a deed subsequent to the written articles, but on the same day. The last transaction took place with full notice of the written agreement to Snodgrass.

To prove this prior parol agreement, the depositions of James Laird and Margaret Jane Laird were read by the defendants; and, to corroborate their testimony, the deposition of John Sproat, jun., was offered to be read, tending to show the declarations of the defendant Sproat, his father, *previous* to the execution of the written agreement, that he had actually agreed with the said Snodgrass, verbally, for the lands, and had put him into possession. This was objected to, and the deposition, so far as it respected this point, was overruled by the chief justice, and Shippen, justice, because John Sproat, one of the defendants, shall not set up his own previous declarations as a ground for his withholding the possession from the person he contracted

with afterwards; nor shall Alexander Snodgrass avail himself of such testimony, but he shall be put to prove his previous contract by witnesses present at the time, or by the circumstances attending the fact. For the defendants was cited Gregory's lessee *vs.* Setter. Dall. 193.

[*Quære*, whether the evidence offered should not have been permitted to go to the jury, though under the circumstances of the present case it was of the weakest kind? Yeates J. gave no public opinion, having been formerly concerned as counsel *pro def.*]

It appeared in the event that the plaintiff had laid the demise in his declaration before the title to his possession accrued, and a juror was afterwards withdrawn by consent.

Messrs. Ingersol, Kittera, and Montgomery, *pro quer.*

Messrs. Hartley, C. Smith, and Hopkins, *pro def.*

WILLIAM MURRAY, *vs.* JOHN PAISLEY.

I replevin, a submission and award between the parties, are evidence to prove the defendant's claim to goods, but not conclusive.

REPLEVIN for a certain quantity of leather. Plea of property. Plaintiff replies property in himself *absque hoc*, &c.

The defendant's counsel admitted that the leather in question originally belonged to the plaintiff, but contended that on the 13th January, 1787, the plaintiff and defendant submitted all disputes and controversies whatsoever between them to five arbitrators named in an arbitration bond, who afterwards on the 5th February, 1787, made an award in pursuance of the submission, whereby they found that 25*l.* 11*s.* 7*d.* was due from the said Murray to the said Paisley, and directed that Murray should give bond and security within three days thereafter for the payment of the same in three months, or in default thereof Paisley should retain the leather for his security for such payment.

The plaintiff's counsel objected to the reading of the arbitration bond and award, and insisted that the same should have been pleaded, or at least that notice thereof should have been given that they would be offered in evidence, to obviate any surprise; and that if the same had been pleaded, the legality of the

award could have been properly drawn in question, which could not be affected under the present plea of property.

Per Curiam. The evidence is certainly admissible. The defendant is at liberty under his plea, to show either a general or special property in himself, either by bill of sale, delivery from the plaintiff, contract or otherwise, and the rule of Court respecting notice cannot be applied to such a case. The defendant is not bound to give information to his adversary under what pretensions he claims the articles in question; neither is the plaintiff under such necessity. The submission and award are evidencé to prove the defendant's claim, but not incontrovertible. The plaintiff is also at liberty to show misbehavior or partiality in the arbitrators, and bring forward every legal exception to the submission and award.

Verdict for the defendant.

Messrs. Montgomery and Henry, *pro quer.*

Messrs. Kittera and C. Smith, *pro def.*

LUDWIG BAISCH vs. GEORGE HOFF.

In *indebitatus assumpsit* for goods sold, an entry in the defendants' day book, that he had received the goods to be disposed of on commission, is no evidence.

Damages given for vexatious delay of payment.

INDEBITATUS ASSUMPSIT for 172*l.* for twelve clocks sold by the plaintiff to the defendant, and also a count on a *quantum valebant*. Pleas, *non assumpsit* and payment. Republication, *non solvit*, and issues.

The plaintiff produced his daybook, and proved by his own oath, the originality of the entry therein of the articles sold to the defendant on the 24th November 1784.

The defendant grounded his defense on this, that the clocks were not sold to him, but delivered to him on commission to sell on the plaintiff's account and pay him the moneys arising therefrom.

He called a witness to establish this fact, but the testimony did not support the assertion.

He then offered his own day book in evidence, to show his entry therein, at the time that he had received the clocks to be disposed of, on commission, and had sold several of them on the plaintiff's account, wherewith he had charged himself.

This was objected to; and *per Curiam*, the evidence cannot be admitted. It is not within the reason or necessity, under which day-books have been usually admitted in evidence, in Courts of judicature, within this state. The agency contended for must be proved by other testimony than defendant's own words or hand writing. If he can establish his agency by proper proof, there is an end of the present controversy, for the plaintiff has laid no count for money had and received to his use, and, therefore, the *allegata* and *probata* would not concur. The danger of such testimony is sufficiently obvious; since there is no sale of goods made by a merchant or shopkeeper in the ordinary course of business which might not be defeated by evidence of this nature, and the greatest inconveniences must arise from its introduction.

The jury gave a verdict for the plaintiff for the principal sum, and also for 46*l.* 8*s.* 9½*d.*, in damages, for vexatious delay of payment, under the charge of the Court.

Messrs. M'Kean and Sampson Levy, *pro quer.*

Messrs. Montgomery and Hopkins, *pro def.*

JANUARY TERM, 1793.

PRESENT — M'KEAN, CHIEF JUSTICE,—SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

LESSEE of JONATHAN MEREDITH vs. DANIEL MACOSS.

The power of an agent to rent lands must be proved by other testimony than that of the agent. If there is a written power it should be produced; if it is burnt or lost, the contents of it should be proved.

Neither shall the agent leasing for some years, and collecting the rents, and the acquiescence of the owner, be presumptive proof of the power of the agent.

EJECTMENT for a house and lot in the city of Philadelphia.

It was admitted on both sides that Mrs. Mary Masters was seized in fee of the premises in question.

The lessor of the plaintiff claimed under a deed made to him by Anthony Butler, her attorney in fact.

The defendant rested his defense under a prior written memorandum, signed by Mrs. Elizabeth Lawrence, the wife of John Lawrence, Esq., who was brother of Mrs. Masters, engaging to rent the premises to him for seven years.

He proposed to examine Mrs. Lawrence as a witness respecting her authority from Mrs. Masters, but the same was objected to. And *per Curiam* : If the defendant grounds his lease on the authority given to Mrs. Lawrence, her power must be proved by other testimony. If there was a written letter of attorney, it ought to be produced to be judged of. If it did once exist, but is burnt, lost, or mislaid, Mrs. Lawrence may be examined to that point, but the contents must be proved by other witnesses, or a copy.

The defendant's counsel then offered to show, that for ten or twelve years previous to the giving of this memorandum, Mrs. Lawrence had leased this property to different persons, and had the management thereof and the collection of the rents; and that Mrs. Master's acquiescence therein should be considered as presumptive proof of an authority given to her sister-in-law.

But *per Curiam*. This is a still stronger deviation from the rules of evidence than what was first attempted. To deduce an argument from a person's usurpation of property, or their possessing themselves of lands, that they therein acted under the authority of the owner, is unfair reasoning, and might be

advanced to sanctify any trespass whatever. Such testimony would be attended with dangerous consequences, and prove highly injurious to society. We cannot possibly receive it.

Verdict *pro quer.*

Messrs. Sergeant and Wilcocks, *pro quer.*

Messrs. Rawle and Howel, *pro def.*

THOMPSON BOYCE vs. HUGH MOORE.

Protest of the captain of a ship must be made at the first port where he arrives after the vessel's misfortune; otherwise it shall not be received in evidence.

Surr on a policy of insurance on the schooner Polly, at and from Cape Francois, to Alexandria, in Virginia.

To prove the loss of a vessel, a protest of the captain made at Alexandria on the 22d September, 1786, was attempted to be read in evidence; but this was objected to, as it appeared that the master and crew had arrived at Newburyport, in Massachusetts, after the supposed misfortune on the 14th August preceding, and that the master had traveled from thence to Alexandria before he made his protest. They contended, on the authority of *Richette vs. Stewart et al.* (Dallas, 318), that the protest should be made at the first port after the vessel had been damaged.

On the part of the plaintiff it was said, that the captain had not money at Newburyport to pay the expense of a protest, and therefore it was an exception to the general rule.

By the Court. It appears that the captain traveled from Newburyport to Alexandria before he made his protest. How could this long journey be performed without money? The pretext for not making his protest at the first port furnishes additional ground for suspicion. We adhere to our determination in the case of *Richette vs. Stewart et al.* A protest is defined (Wesket, 432) to be "a declaration upon oath, usually made by the master and some of his people before a justice, notary, or consul, at any place *where they first arrive.*" The maritime law requires it to be made at the first port of arrival, and must be founded on this reason, that at such port, if any fraud is intended, it can be most easily detected; it is the best guard against any subsequent collusion. The safety of the trading world depends greatly on using every prudent precaution with respect to protests, which are made by masters of vessels in vindication of, or

excuse for, their own conduct. The exceptions to the general rule must be satisfactorily proved, which not being done in this instance, the present protest cannot be read in evidence.

Plaintiff nonsuit.

Messrs. Lewis and Levy, *pro quer.*

Messrs Sergeant and Ingersol, *pro def.*

SAMUEL PLEASANTS, surviving administrator of ISRAEL PEMBERTON *vs.* ANNE PEMBERTON, administratrix of JOSEPH PEMBERTON.

A guardian who has signed a receipt for 4000 continental dollars on the 19th February, 1780, may (under a release from his ward) be a witness to prove what passed at, and immediately before, the subscription of the receipt. The rule, that a party shall not be permitted to give testimony to invalidate an instrument which he has signed, is now confined to *negotiable instruments*.

CASE. The declaration consisted of three counts: 1st, Money lent. 2d, Money had and received to the plaintiff's use. And, 3d, *Insimul computasset.*

The defendant pleaded *non assumpsit* and payment, and the Statute of Limitations.

The action was brought for the use of George Fox, esq., and Mary, his wife, who was the only child of Charles Pemberton, one of the sons of Israel Pemberton, to recover a sum of money which Joseph Pemberton, the intestate, owed to his father's estate, in order to equalize their dividends of the personal estate of the said Israel.

The defendant gave, in evidence, a receipt for 4000 "continental dollars," to the said Joseph Pemberton, in his life-time, subscribed by Doctor Thomas Parke (guardian of the said Mary Pemberton, now Fox), on account, dated 19th February, 1780.

On the part of the plaintiff, Dr. Parke was called as a witness to prove what passed at, and immediately before, the time of subscribing the receipt, when the money was so greatly depreciated. Should any objection be made to his competency on the ground of interest, they offered a release on the part of Mr. and Mrs. Fox to obviate that difficulty.

The defendant's counsel contended that such evidence was not admissible, but took no exception on the ground of interest. They insisted that it was a general rule of law, founded on public policy, that no one who has signed a paper or deed shall

ever be permitted to give testimony to invalidate that instrument which he has so signed. 1 Term Rep. 300, 1, 2, 2. A contrary practise would be attended with great mischiefs. Suppose a person about to purchase lands under the incumbrances of judgments, he is shown receipts and vouchers for different sums of money, and giving faith thereto, makes his contract and pays the consideration, reserving a sufficient sum in his own hands to settle such judgments as are apparently unsatisfied. If the vouchers which have been shown him are subject to be explained and frittered away by parol testimony, especially of the persons who have signed such receipts, his situation will be rendered very insecure. A witness shall not be permitted to deny his own attestation. 4 Burr. 2225.

By the Court. The rule which has been cited is confined by the latest decisions to "negotiable" instruments; and the ground of it is, that it is holding out false credit to the world. 3 Term Rep. 32, 34, 36.

Dr. Parke is not called to invalidate his receipt, but to prove an extraneous fact. The expression in it, of "continental dollars," as late as 19th February, 1780, when such money was depreciated at the rate of $47\frac{1}{2}$ for 1, is remarkable, and requires explanation. This can only be done by the witness, Joseph Pemberton being dead, and no one else present at the transaction. In 1 Term Rep. 301, Willes, justice, cites a case ruled by him, where two brothers joined in an assignment of a ship, and one of them was admitted to show that he had no property, whatever, in the vessel, but joined in the assignment at the express instance of the vendee, who otherwise would not accept the assignment; and the Court of Common Pleas refused to set aside the verdict. We are, therefore, unanimously of opinion, that Dr. Parke's testimony be admitted.

Verdict for plaintiff for 1719*l.* 3*s.* 8*d.*

Messrs. Ingersol and Rawle, *pro quer.*

Messrs. Sergeant, Wilcocks, and Tilghman, *pro def.*

CHARLES TAAN and SONS, indorsees of SAMUEL MERRIAN, vs.
PETER LE GAUX.

A suit may be brought against the drawer of a bill of exchange, for non-acceptance, before it becomes payable, but the party is not entitled to interest from the notice of protest, nor to the twenty per per cent damages.

The current rate of exchange, at the time of trial, must determine the sum to be recovered; if there is no rate, it must be paid at par.

SUIT for non-acceptance of a bill of exchange, drawn by the defendant on Madame Le Gaux, at Paris, for 600 livres tournois, dated 20th November, 1787, payable ninety days after sight.

The defendant's hand writing to the bill, and Merrian's indorsement having been proved, the plaintiffs gave in evidence the protest for non-acceptance, dated 29th January, 1788, and notice of the protest to the defendant on the 8th May, following.

A difficulty arose with respect to the rate of exchange between the cities of Philadelphia and Paris; and it turned out upon inquiry, that there was no settled rate of exchange between those cities. Hereupon the plaintiff's counsel insisted that the jury should give them in damages, what the defendant had received for the bill and interest from that period. One of the jurors remarked, that by the usage of merchants, no remedy could be had on a bill of exchange, until it was protested for non-payment.

Sed per Curiam. It is now settled, that if a bill of exchange is not accepted, an action will lie upon it against the drawer, before the time when it is made payable. The reason given for it is, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract.

This has been determined in England, in Bull. Ni. Prius, 269 (edit. 1775), and Doug. 55. The same doctrine has been laid down in this Court, in the case of Duncan Ingraham, jr., indorsee of Cornelius Schenkhousé vs. Josiah and William Gibbs, tried at the sittings for Philadelphia county, in November, 1791; and in this very term, between John Freund vs. John Charles Heilbron. But it is to be observed, that our act of assembly of 12 Will. 3, giving twenty per cent damages, in case "the bills be returned back *unpaid*, with a legal protest," no such damages are to be given on a bill protested for non-acceptance, but only interest from the time of notice of protest.

The plaintiffs are entitled to recover such a sum in damages, as would now purchase a bill of exchange for 600 livres tournois at the current rate of exchange, which may turn out to be either greater or less than the sum paid to the drawer, according to the rise or fall of exchange; but if there is no current ex-

change, the jury can pursue no other safer rule than by giving damages adequate to the rate of exchange at par, and interest from the time of notice of protest.

Verdict *pro quer.*, for 56*l.* 12*s.* 10*d.*, damages.

Mr. Moylan, *pro quer.*

Messrs. Ingersol and Rawle, *pro def.*

RESPUBLICA *vs.* THOMAS WRIGHT (a bankrupt).

A bankrupt may be committed for perjury, in his examinations, before the forty-two days, or such further time as may be allowed for his examination.

THE defendant had been declared a bankrupt, and had been several times examined by the commissioners, and signed his answers to the interrogatories; but the forty-two days being nearly expired, further time was allowed by the commissioners "to finish his examination," under the 13th section of the act "for the regulation of bankruptcy" (pa. 649). In the meantime his deposition already made, was contradicted by two witnesses; and a question was made before Mr. Justice Bradford, whether all his examinations were not to be considered as one act; whether he was not at liberty to add to, alter, explain, or contradict his former declarations; and whether the crime of perjury is complete, so as to commit the bankrupt until his examination was finished?

This matter was debated by counsel, before the learned judge, who having taken time to consider of the point, now delivered his opinion openly in Court, to the counsel, who had argued the matter before him.

I am clearly of opinion that the bankrupt may be committed before the expiration of the forty-two days, under the 14th section of the bankrupt act, where it appears on the depositions already taken, that he has committed wilful or corrupt perjury, tending to the damage of his creditors 20*l.* A contrary doctrine would be highly destructive to the community, that the bankrupt could not be secured to take his trial when there appears strong evidence of his guilt. His subsequent examinations may be matter of evidence to go to a jury, explanatory of the answers he has already given, and be judged of by them under all the circumstances of the case. But when it appears that a wilful perjury has been committed, it is not necessary to wait until the examination be finished before cognizance is taken of

those on forcible entry and detainer. Each were *festina remedia*. Defendant in forcible entry and detainer can in no case *ex rigore juris* demand a restitution either on the quashing of the indictment, or a verdict for him on a traverse thereof, &c. The Court of King's Bench will never award restitution, but when it appears, on the whole circumstances of the case, that the defendant has some right to the premises, the possession whereof he lost by the restitution granted to the prosecutor. 1 Haw., p. O. pa. 155, cap. 64, § 65. Restitution is of duty, but re-restitution is of grace, say Twisden and Kelyng, justices. Raym., 85.

Besides, the situation of our Courts demands that this Court should, in such an instance, exercise a discretionary power. When the Courts of ordinary jurisdiction are made instruments of injustice, and when the principles of law by which they are guided give no right but upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent, equity will interpose its jurisdiction. Mitford's Bill in Chanc., 103, 104. Bills in equity to restrain proceedings in Courts of ordinary jurisdiction are still frequent, though the Courts of Common Law have been enabled, by the assistance of the legislature, as well as by a more liberal exertion of their inherent powers, to render applications of this nature to a Court of Equity unnecessary in many cases, where formerly no other remedy was provided. *Ib.*, 116. The want of a Court of Equity here suggests a strong argument for the exercise of the discretionary power contended for by the defendant. The right of the plaintiff in error to the possession of the tenements in dispute has been fairly and substantially (though informally) tried with his own consent, assisted by counsel. He shall not now, by a trick, evade the effects of his own agreement.

Per Curiam. This case cannot be resembled, with propriety, to the usual cases of proceedings, being reversed on writs of error at common law. It partakes more of the nature of proceedings on forcible entry and detainer. Though a judgment has been pronounced, yet we may stop execution on equitable grounds being laid before us, in a variety of instances.

We adhere to our former opinion, that it rests in our discretion to award restitution, and that we are not bound *ex debito justitiae* to award it.

Under all the circumstances which have appeared to us, we cannot think that the plaintiff in error is entitled to restitution from the *grace* of the Court.

Motion denied.

MARY ROBERTS *vs.* JOHN SWIFT, JOHN MAXWELL NESBIT, and
SAMUEL BENEZET, executors of JOHN KIDD.

If one does services for another at his *request*, no matter what his expectations were, *assumpsit* may well be supported to recover a compensation.

Though a jury give liberal damages in *assumpsit*, yet if they are not outrageous, Court will not order a new trial.

MOTION for a new trial, on the following statement of facts made by Mr. Justice Shippen, before whom and Mr. Justice Bradford, the cause was tried at the last October assizes for Bucks county.

This was an action of *assumpsit*. Pleas *non assumpsit* and payment.

The plaintiff's demand consisted of two parts. 1st. For wages for fifteen years service in the testators' family. 2d. For an annuity of 30*l.* per year during her life, on a supposed express promise from the testator.

In support of the plaintiffs' demand, it appeared in evidence, or was admitted, that she was the niece of Mrs. Kidd, the wife of the testator, and one of her heirs at law; that the most considerable part of Mr. Kidd's fortune came by his wife, who vested the whole in him; that the plaintiff, when a girl, had learned the trade of a mantua-maker, at Burlington; that she afterwards set up that trade at Bristol, took her mother to live with her, and carried on business to advantage; that when her aunt married Mr. Kidd, she left off her business and went to live with them; and there was some evidence, though not very explicit, that this was at the instance and particular request of her aunt; that during the time she lived in Mr. Kidd's family, she was industriously employed in his service; and that the work she did there was of different kinds, such as sewing, mantua making, knitting, and making clothes for all the family, which consisted of eight blacks and one white girl of ten or eleven years of age; that besides this, she occasionally attended the kitchen, and assisted in preparing and serving up dinners for company; that although she was sometimes permitted for a few days at a time, to work for a neighbour in the way of her business, yet in general she was refused to be spared from her work in the family; that no contract had been made for payment of these services, nor were any payments made, the plaintiff having an ample supply of clothing of her deceased mother's. After many years residence in Mr. Kidd's family, in this way, she was at length compelled to leave it, occasioned, as it was said at first, by an insult offered to her by one of the negroes, and afterwards by her incurring the displeasure of Mr. Kidd, who desired her to leave

the house. She applied to Mrs. Coxe as her friend, and prevailed on her to go to her uncle (as she called Mr. Kidd) to state her situation to him, and ask for assistance. Mrs. Coxe accordingly expostulated with Mr. Kidd, and at length asked him what he meant to allow *Polly* for her services; he answered, that he had been in a passion with her and was sorry for it; that he did not mean to throw her off, but would allow her 30*l.* a year, which the witness understood to be for her life; that Mr. Kidd did not expressly say so, but she believed he meant so. It further appeared in evidence, that Mr. and Mrs. Kidd had said, they took *Polly* to provide for her, and Mrs. Kidd told a neighbor shortly after her marriage with Mr. Kidd, that if *Polly* married to her liking, she would give her 500*l.*

The evidence on the part of the defendant, consisted chiefly in a number of letters written by the plaintiff to the testator from Virginia, where she had gone on a visit to her brother. In these letters she pathetically describes her wretched situation, expresses her grief for lying under his displeasure, and signifies to him, that her sole dependance for support was on the generosity and goodness of her uncle and aunt. Some other of her letters appeared upon her return from Virginia and her final departure from the house, wherein she solicits her uncle for assistance, and reminds him of his promise to allow her 30*l.* a year; and tells him, if he did not mean to provide for her, he ought to have let her know it, in the early part of her life.

It appeared, that Mr. Kidd had paid several sums of money for her board, for which the plaintiff gives his estate credit in her account, shown to the jury; Mr. Kidd likewise bequeathed her 50*l.* in his will.

On this evidence, the Court gave a charge favorable to the plaintiff; but at the same time told the jury, they could not consistently allow both parts of the plaintiffs' demand; that is, a compensation for the fifteen years services and the value of the 30*l.* a year annuity too; because it appeared in evidence, that the annuity promised was intended as a compensation for those services; but that they might measure the value of her services by that promise, and allow a gross sum equal to what they should calculate that annuity to be worth.

The jury found for the plaintiff 720*l.* damages, and appear to have measured their damages in a different way from that recommended by the Court. They have rejected the annuity and given the plaintiff a sum equal to 30*l.* a year during the fifteen years service, together with interest.

A point of law was urged by the defendant's counsel, in the course of the trial, that the plaintiff, having done those services in contemplation of a legacy, she was therefore not entitled to a compensation in an action for those services. The Court were of opinion that this depended on the evidence given in the cause. If it was a mere voluntary courtesy, the law was as stated by the defendant; but if the evidence satisfied the jury, that the services done were *at the request* of the testator, then it was not a mere voluntary courtesy, and the action will lay.

Mr. Ingersol, for the defendants, now moved for a new trial, on three grounds: 1st, Misdirection of the Court; 2d, Verdict against evidence; and, 3d, Damages being excessive.

He contended that there was no evidence given to the jury of any contract whatever between the parties respecting wages, either express or implied. Indeed, the plaintiff, in one of her letters to the testator, disavows any claim on that ground, but appeals to his generosity alone. It is now a settled rule of law, that when one does services for another in expectation of a legacy, he shall not resort to his action on being disappointed. It is to be considered how it was understood by the parties at the time of doing the business. *Osborn vs. the Governors of Guy's Hospital*, 2 Stra. 728. The principle is the same, whether the services done for the deceased are great or small. The quantum of the work and labor can make no difference in law. As well might an action lie for a right of gleaning; but a matter of courtesy or charity shall not be turned into a right. *Hen. Black Rep.* 51.

Great injury will be done to society by sanctifying the present verdict. No one will venture to afford shelter to a poor relation or friend, if he is to meet this retribution for his good offices. The effect produced will be the reverse of what is proposed.

Besides, the damages are exorbitant. The measure of damages, recommended by the Court to the jury in case they found that the services were done at the request of the testator, was to adopt the 30% per annum, said to have been promised to the plaintiff, which was a most liberal allowance. In this mode of calculation, the damages would have amounted to 450%. but the jury have swelled them to 720%.

Messrs. Sergeant, Wilcocks, and Coxe, for the plaintiff, insisted that the rule of law cited was general, but subject to exceptions. For if there was "*any request*" made by the defendant, there the courtesy or benefit shall be presumed to be not volun-

warrant for the premises, reciting the first settlement of the land, the sale to William Campbell, aforesaid, and the conveyance of his heir at law to said Duncan.

On the 20th October, 1785, the same Benjamin Walker also takes out a warrant for these lands.

On the 11th November, 1785, a survey is made containing 324 acres; and on the 1st November, 1786, Duncan enters a *caveat* against the acceptance of Walker's survey, or granting him a patent.

In the interim, on the 26th September, 1786, James Alexander settles his administration account on the estate of William Campbell, in the register's office of Northumberland county, wherein he charges himself with the amount of sales of the improvements contained in the inventory, and the personal estate, £279 and credits himself with several sums, amounting to 84 15 11

Balance remaining in his hands.....	£194	4	1
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On these facts, two exceptions were taken to the title of the defendant.

1st. That James Alexander, the administrator of William Campbell, could not, consistently, with the laws or usages of this state, sell this improvement without being empowered so to do, by an order of the Orphan's Court.

2d. That no right to the improvement attached until the 21st December, 1784, when the law passed, amending the act of assembly for opening the land office, and consequently could not legally be transferred.

It was admitted by the plaintiff's counsel, that should he recover in the suit, these lands were liable to the debts of William Campbell, deceased, in case of a deficiency of personal assets.

It was at length agreed that the jury should find a verdict for the plaintiff, subject to the opinion of the Court, in bank, on the point reserved, whether the lands in question, sold by James Alexander, as administrator of William Campbell, were to be considered as governed by the rules of real or personal property. If the Court, on argument, should be of the former opinion, then judgment to be entered for the plaintiff; if otherwise, judgment to be entered for the defendant.

The point reserved came now to be argued by Mr. Ingersol for the plaintiff, and Mr. Lewis for the defendant.

On the part of the plaintiff it was urged, that this pre-emption right could be considered in no other light than real estate. The words of the act of 21st December, 1784, § 10 (Loose Acts, p. 411), are, "all and every person or persons and their *legal representatives*, who has or have heretofore settled on the north side of the west branch of the river Susquehannah, &c. shall be allowed a right of pre-emption to their respective possessions, at the price aforesaid." The question then is, Whom do the words "legal representatives" designate?

By the act of assembly passed February 18, 1769 (Hall and Sellers's edit. 696), all persons who shall presume to settle on lands not purchased of the Indians, being legally convicted thereof, shall forfeit for every offense the sum of 500*l.*, suffer twelve months imprisonment, and find security for his good behavior for twelve months after the expiration of his imprisonment.

Under this law, therefore, the persons who have made such settlements on the Indian lands, must be considered as trespassers, until the act of 1784, which declares that such persons have "by their resolute stand and sufferings during the late war merited a pre-emption to their respective possessions."

We contend that "legal representatives" refer to heirs, the subject matter being lands, and that they cannot relate to executors or administrators.

Lands, *ex vi termini*, mean estates of inheritance. 2 Black. Com. 16. At common law, previous to the statute of 32 Hen. 8, c. 37, if the lessor who had reserved rent service, had died, and there had been rent arrear, neither his heir nor executor could maintain an action of debt for them. Not the heir because he had nothing to do with the personal contracts of his ancestor; nor the executor, because he could not *represent* his testator as to any contracts relating to the freehold and inheritance. 2 Bac. Abr. 16; Co. Lit. 162, *a*. No executors can succeed to a freehold. 2 Black. Com. 259. Where an estate is to vest on condition of payment of money, and the ancestor dies, the heir may perform the condition, and shall have the estate. Ambl. 179; 1 Equ. Cas. Abr. 106, pl. 6. Conditions and covenants real shall descend to the heir, and he alone shall take advantage of them; and this not only where there are express words, but where there are none. 3 Bac. Abr. 20. Where executors or administrators are described, they are called *personal* representatives. 2 Bl. Com. 158. Where they are contrasted with heirs, heirs are called *real* representatives. 3 Atky. 685; Chaloner *vs.* Butcher, cited. Descent or hereditary succession, is the title whereby a man, on the death of his ancestor, acquires his estate by right

sentatives" are expressly referred to both real and personal estate.

But what sets this matter beyond all question, are the words of the acts of assembly of 4 Annæ and 4 Geo., 3. In the former, passed in 1705, for the better settling of intestates' estates, § 1, p. 23, the Orphans' Courts are to make distribution of the balance of the *personal estate* among the wife and children, or children's children (if any such be), or otherwise to the next of kindred of the dead person in equal degree, "legally representing" their stocks. And in fixing the mode of distribution of the personal estate (§ 2), it directs two-thirds thereof to go to the children of the intestate, and to such persons as "legally represent" such children; and in case there be no children, nor "legal representatives" of them, one moiety of the personal estate is allotted to the wife, and the residue to the next of kindred of the intestate, who are in equal degree, and those who "legally represent" them.

In the supplement to this act, 4 Geo., 3, passed 23d March, 1764, § 1, p. 307, the word "representatives" is referred to both real and personal estate; and, in the same section, "legal representatives" refer expressly to personal estate. In the 4th section of the same act, "representatives" relate to the dividend arising to each child out of the one-third of the amount of the valuation reserved to pay the widow's dower.

It may, therefore, fairly be concluded that the words "legal representatives" may relate to any subjects of a descendible quality, to an estate of freehold or a term for years in lands, to either real or personal property. As the case may be, they may refer to heirs when the subject matter is freehold, to "executors" or "administrators" when it is of a less estate.

The act of 18th February, 1769, certainly operated as a bar to persons claiming lands under settlements on the Indian lands; but the act of 21st December, 1784, removes that bar, and operates retrospectively. The defendant had a portion of merit, by his stand and sufferings after his purchase in 1781, which was contemplated by the legislature.

It is true, the sale by James Alexander, as administrator of William Campbell, was without any order of Orphans' Court. But, considering the claim at that time as an improvement, it is within the spirit of the cases, Burger's lessee *vs.* Trexel, tried at Nisi Prius, at Easton, and Eip's lessee *vs.* Marat, tried at Nisi Prius, at Lancaster, before the revolution; where, in both instances, sales by administrators of improvements, without any orders of Orphans' Court, were sanctified by the decisions of the

Courts and juries. It would now be dangerous to shake those determinations on which many titles depend.

It is material to consider the view in which the legislature contemplated these pre-emption rights, at the time of passing the law of 1784. They could not be deemed *legal estates* in any shape, either before or after the passing of the act. Persons who had settled on the Indian territory previous to 1780, and continued thereon during the war, were allowed a right of pre-emption to their respective possessions, *provided* they applied for the same, and tendered the consideration to the receiver general of the land office before the 1st November, 1785. It could not, therefore, be regarded as a right of inheritance, but it was a mere privilege to purchase; it was not a descendible right to the heir. Until application for the warrant, and the money paid or tendered, no legal estate vested. It was an imperfect right, which, by being pursued up, as the law directed, would vest the wife with the right of dower, would entitle the husband to hold by the courtesy, and would exclude the half-blood from taking as heir by descent to the person last seized; it would, in short, then for the first time, become a legal real estate.

Mr. Charles Smith was beginning to reply on the part of the plaintiff, but was stopped by the Court.

And afterwards, this term, the chief justice delivered the opinion of the Court.

The question is, whether under all the circumstances of this case, as reported, the lands in question are to be considered as governed by the rules of real or personal property? The solution thereof depends on the true construction of the 8th and 9th sections of the act of the 21st December, 1784, the decisions of Courts of justice on inchoate rights and claims, and the usage of the land office.

It is not easy to denominate the species of property (if it may be properly termed such), which the settlement of these lands gave in the first instance. A right of improvement it could not be called. It was a wrongful act in despite of positive law, which inflicted for the offense a penalty of 500*l.*, one year imprisonment, and a binding to the good behaviour for one year afterwards. According to the opinion of the Court, delivered in the case of the lessee of John Hughes *vs.* Henry Dougherty, tried at Sunbury, October assizes, 1791, "It was an offense that tended to involve the country in blood; but the merit and sufferings of the actual settlers cancelled the offense; and the legislature, mindful of their situation, provided this special act for

their relief. The preamble of the act of 1784, recites their resolute stand and sufferings, as deserving a right of pre-emption."

If the respective words of the act are thought to dignify this as an improvement, considered as referable to the year 1781, the proper system has not been adopted in this case to enable the administrator to sell the property. Improvements made *animo residendi*, and even warranted and surveyed lands, thirty-five years ago, or thereabouts, were generally considered as mere chattel interests, and appraised as such in inventories of deceased persons; they were sold in the common course of administration, by executors or administrators, as mere personal property, and such sales when made fairly for the purpose of payment of debts, or bringing up minor children (though even by executors *de son tort*), have been sanctioned by frequent decisions in Courts of justice, before the revolution. The same point occurred to us at Lancaster, June assizes, 1782, in the case of the lessee of Robert Means and Grizel Little *vs.* Joseph Flora, sr. and jr., and a determination of the same kind took place, though the lands in question had been first settled under a license from James Logan, one of the commissioners of the land office. This was formerly the general usage and practise of the country; but it has been discontinued about thirty-four or thirty-five years, and the uniform system has been since, in the case of an intestacy, for the administrators to apply to the Orphans' Courts for an order empowering them to sell the improvement, or warranted and surveyed lands. In this point of view, the defendant's title is evidently defective.

The words "legal representatives" contained in the law, are equivocal in themselves, as has been abundantly shown by the defendant's counsel, and may be referable either to "heirs," "executors," or "administrators," according to the subject matter. As they relate to lands in this instance, we apprehend the words are to be considered as referring to "heirs," and that this was the meaning of the legislature, though the right was at first inchoate and imperfect. When a person dies possessed of an improvement right, it now descends (such as it is), on his heirs; so of lands warranted and surveyed. And the determinations of Courts of justice have accorded therewith.

The practise of the land office also concurs, when the original improver, or taker up of the land has died, before the patent issued. The patent is invariably made to the heirs of the decedent, or in trust for their use, or the devisees, abstracted from the usage before alluded to, which has been discontinued so many years ago.

Upon the whole, we think that the title to the lands in question must be governed by the rules of real property, and that judgment be entered for the plaintiff.

WALTER WHITE, lessee of EARLES BARNES, *vs.* SOLOMON HART.*

RICHARD RED, lessee of same, *vs.* same.†

Husband, before marriage, covenants with his intended wife that she may dispose of her lands by will; she devises them during coverture; this shall operate as a good appointment, and her heir at law shall be bound, without any legal estate being vested in trustees.

THESE causes came on to be tried at Newtown, for Bucks county, October assizes, 1791, before M'Kean, Chief Justice, and Yeates, Justice. After the evidence was gone through, a juror was withdrawn by consent, and the following case was stated for the opinion of the Court, in bank.

John Earles being seized in fee of a messuage and tract of land in the township of Warminster, in the county of Bucks, containing 250 acres, or thereabouts, made his last will and testament, dated the 13th November, 1772, and therein devised the residue of his estate to his three daughters, Mary, the wife of John Barnes; Isabella, the wife of Barnard Vanhorn; and Margaret, who was first married to William Irwin, and afterwards to Matthew Henderson.

The said John Barnes, an Mary, his wife, died in the life-time of the said Margaret Henderson, leaving issue Earles Barnes, the lessor of the plaintiff, who was the eldest son of the said Mary, and other children.

The said Margaret, previous to her marriage with Matthew Henderson, became seized in fee of a tract of land contiguous to that above mentioned, containing 56 acres 81 perches, or thereabouts. She having received proposals of marriage from the said Matthew Henderson, articles of agreement were entered into between them and a certain James Wallace, to the effect following:—

This indenture *tripartite* made the 29th day of June, 1774, between Matthew Henderson, of, &c., of the first part, Margaret Erwin, of, &c., of the second part, and James Wallace, of, &c., of the third part; reciting that the said Margaret is seized of a certain stone messuage and tract of land in W. aforesaid, and possessed of an annuity of 25*l.* during life, and entitled to a large expectancy out of the estate of her father on the decease of her mother; and further reciting that a marriage is intended to be shortly solemnized between the said Matthew and Margaret, and that it is agreed between them, that after the solemnization

* See 2 Dallas, p. 199. † 3 John. Ch. p. 523.

thereof, the said messuage and tract of land, annuity and expectancy, shall be for the joint use of the said Matthew and Margaret during coverture; but if the said Margaret shall survive the said Matthew, the whole to remain the estate of the said Margaret, as if the said marriage had never taken effect; and if any part of the said expectancy more than the yearly interest thereof shall have been applied to the use of the said Matthew, the same to be replaced out of his proper estate; and, further, that the said Margaret shall have full power and absolute authority, by will and testament in writing, to give, devise, and dispose the said messuage and tract of land and expectancy to such persons, and for such uses, as she shall see fit, as fully as she could have done if the said marriage had never been solemnized. Now this indenture witnesseth, "that for making the said agreement good and effectual in the law, and for keeping and preserving the said messuage, &c., as also the said annuity and expectancy, to be at the disposal of the said Margaret as aforesaid, so that the same shall not be in the power or disposal of the said Matthew, or liable to any of his debts and incumbrances, further than is herein before set forth, he, the said Matthew, doth for himself, his heirs, executors, and administrators, and for every of them, covenant, promise, declare, and agree to and with the said James Wallace, his executors and administrators, and to and with every of them, by these presents, that notwithstanding the said intended marriage shall take effect and be solemnized, the said messuage, tenement, and tract of land, shall be the proper and distinct estate of her, the said Margaret, to the use of him, the said Matthew, and her, the said Margaret, during their joint lives; and if the said Matthew shall die before the said Margaret, then immediately after his death to the use of the said Margaret, her heirs and assigns forever, as fully, freely, and clearly, as if the said marriage had never been had and solemnized; and that the said expectancy (except the yearly profits or interest thereof) shall, in like manner, remain the proper and distinct estate of said Margaret, and also the said annuity, or such part or parts thereof, as shall grow or become due after the decease of him, the said Matthew. And the said Matthew doth for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said James, his executors and administrators, by these presents, in manner and form following; (that is to say) that if the said intended marriage shall take effect and be solemnized, then he, the said Matthew, shall and will permit and suffer the said Margaret to grant and devise the said

messuage, &c., by her last will and testament, in writing, to such person or persons, and for such uses as she shall think fit, and also to bequeath the whole amount of the said expectancy (exclusive of the yearly interest thereof during their joint lives, as aforesaid) unto such person or persons as she shall think fit; and that he, the said Matthew, shall and will permit such will hereafter to be made, to be duly proved by the executor or executors in the said will named, and probate of such will to be had and taken as usual, and that the person or persons to whom the said Margaret shall give, devise, and dispose of her said separate estate, as aforesaid, shall, and lawfully may, peaceably and quietly have, hold, occupy, possess, and enjoy the same and every part thereof, according to the true intent and meaning of such gift, devise, or bequest, in the said will to be set forth, without any let, suit, trouble, hindrance, denial, or interruption of or by the said Matthew, his heirs, executors, administrators, or assigns, or any of them; and, further, that if the said Margaret shall hereafter see fit to sell the said land, with the buildings and improvements, or the said annuity, or any part thereof, and shall apply the moneys arising by such sale or sales, or any part thereof, or any part of the capital sum of the said expectancy, for and to the use of him, the said Matthew, and for the advancement of his particular estate, that he, the said Matthew, his heirs, executors, or administrators, shall and will, on demand made, pay the same unto such legatee or legatees as the said Margaret shall bequeath the same, save only the use of the same during their joint lives, as aforesaid; and that he, the said Matthew, his heirs, executors, or administrators, shall not, nor will, at any time or times hereafter, do, commit, or suffer, or cause to be done, committed, or suffered, any act, matter, or thing whatsoever, whereby or wherewith, or by reason or means whereof, the said Margaret shall, or may be, any ways frustrated or hindered in the giving, devising, or bequeathing, nor of holding, possessing, and enjoying her own particular estate, to the uses and in manner aforesaid. In witness," &c.

The marriage between the said Matthew Henderson and Margaret Erwin took effect. They had no issue.

On the 29th January, 1790, the said Margaret Henderson executed a writing under her hand and seal, purporting to be her last will and testament, or an appointment respecting her separate estate, whereby she bequeathed to the said Earles Barnes, the lessor of the plaintiff, the sum of five shillings, and to her other nephews and nieces divers pecuniary legacies; and the residue of her estate she directed to be divided among the said

legatees, in proportion to their said legacies. She also appointed Joseph Hart and Nathaniel Erwin her executors, with full power and authority to dispose of her whole estate, real and personal.

The said Margaret died in the month of March following her will.

This instrument was proved as a will on the 15th day of the same month, and letters of administration were taken out on her estate by the said Joseph Hart and Nathaniel Erwin, the persons named as her executors. They entered on the premises in question and sold them. The brothers and sisters of the lessor of the plaintiff, have, by their acts and deeds in writing, assented to the said sale.

The first of these ejectments is brought for a moiety of the undivided interest in the real estate of the said John Earles, which the said Margaret took as one of the residuary devisees of the said Earles.

The second ejectment is brought for a moiety of the tract of land purchased by the said Margaret in her life time.

The question for the opinion of the Court is whether, upon the preceding facts, the plaintiff is entitled to recover.

These causes were very fully and ably argued at the last January term, by Messrs. Rawle and Bankson for the plaintiff, and Messrs. Sergeant and Wilcocks for the defendant.

On the part of the plaintiff, four points were made :—

1. The will of the feme covert is void at common law, or at least by the stat. of 34 and 35 Hen., 8.

2. The articles bar the husband, but not the heir-at-law.

3. Chancery would not decree the heir-at-law to aid an imperfect will, unless in the case of persons coming in for a valuable consideration.

4. Chancery never makes such decrees, unless as to *trust* estates; this is a *legal* estate, vested in the wife before marriage.

The reasonings of the counsel are omitted, as the Court went fully into the argument this term.

Cases cited for the plaintiff: Powel on Powers, 136; Arundel *vs.* Philpot, 155 to 169; 3 Atky., 715, 295; Maxims in Equ., 67, pl. 14, 68, pl. 15, 16; 2 Vez., 190, 191; Ambl., 467, 474; Bramhall *vs.* Hall; 1 Brown's Cha. Rep., 16; Holme *vs.* Tena and executors; Fearne's Cont. Rem., 89, 94; Comy. Rep., 250; Piggot *vs.* Penrice and executors; 1 Vern., 68, 69; Vermuden *vs.* Read.

Cases cited for the defendant: 2 Vez. 190, 191, 193. Peacock *vs.* Monk. 2 Term Rep. 695. Hosden's lessee *vs.* Staple. Powel on Contracts, 67. Wright *vs.* Lord Cadogan. S. C. 6 Brown's Parl. Cas. 156. Ambl. 468, 473. Bramhall *vs.* Hall. Ambl. 627. Thornbury's lessee *vs.* Dew. Ib. 565. Rippon *vs.* Dawding. S. C. Powel on Contracts, 73.

The Court now proceeded to give their opinions *seriatim*.

M'Kean C. J. The question is whether a feme covert seized of a real estate in fee, can in consequence of a power contained in articles executed between her husband and her before their marriage (the legal estate not having been conveyed to trustees), give way such estate by will, or instrument in nature of a will, during the coverture.

The articles of the 29th June, 1774, are therein called a deed tripartite, and the name of James Wallace is introduced into them as a party, along with Margaret Erwin and Matthew Henderson, and they are executed by all three; but no estate is thereby conveyed to James Wallace, as a trustee or otherwise. Margaret Henderson, during her marriage with Matthew Henderson, makes a disposition by an instrument, in nature of a will, of all her estate, real and personal.

It is very clear, that a feme covert by virtue of an agreement between her and her husband before marriage, may dispose of her *personal* estate by will or testament, because it is to take effect during the life of her husband; for if he survived her, he would be entitled to the whole, and therefore he alone could be affected by it. 2 Vez. 191. Peacock *vs.* Monk.

It is also clear that a married woman cannot devise her real estate. By stat. 34 and 35 Hen. 8, sec. 14, it is expressly enacted, that "wills of any manors, lands, tenements, or other hereditaments, made by any woman covert, shall not be taken to be good or effectual in law."

It is further agreed, that if the *legal* estate in the lands had been vested by the deed, or articles, in James Wallace, the appointment by Margaret Henderson would be valid and good in equity, for then she would have had only an *equitable interest*; a confidence would have been reposed in the trustee, that he would make such estates as she should direct. Her will would have amounted to a direction which bound his conscience, and which a Court of Chancery would enforce. 2 Vez. 192. 6 Brown's Parl. Cas. 156. Powel on Contracts, 67.

But in this case Margaret Erwin, or Henderson, was the donor, and also the donee of the power; and, it is contended, that she could not execute it during her coverture, because the

fee still remained in herself, and she was restrained by the statute of Hen. 8, from making a *will*; and, by the maxims and rules of the law, disabled, having no will of her own.

The instrument of 1790, executed by Margaret Henderson being then covert, is not strictly a will, but distinct from it though in nature of a will. It takes its effect out of the articles, or deed of 1774, which created the power to make such instrument, and was made in execution of such power. She takes notice in the preamble of it, that she was a married woman and that as to what she was legally entitled to dispose of her will was as is therein mentioned. It is usually called an appointment.

A feme covert can execute an appointment over her own estate. Powel on Powers, 34. 3 Atky. 712. The reason, on ground of a wife being disabled to make a will, is from her being under the power of the husband, not from want of judgment, as in the case of an infant, idiot, &c.

Matthew Henderson and his wife, before their marriage, agreed that her real estate should remain her property, and might be disposed of by will and testament in writing by her, as she should think fit, as absolutely as if the said marriage had never been solemnized. The intention of the parties is plain, and admits of no doubt. She has, accordingly, disposed of it by an instrument in nature of a will and testament, in execution of the power, and by the express consent of the husband, not to him or his relations, but amongst her own nearest of kin. No fraud, force, flattery, or improper use of the power he had over her as a husband, has been exerted, nor is it alleged. This will bar him of any title to her estate, and why should it not bar the heir at law in equity and reason? Here was a fair and lawful agreement between them, founded on a valuable and meritorious consideration. Mrs. Henderson, with her husband, could, during the coverture, have given away her real estate by fine or deed (if she had been secretly examined, agreeably to the act of assembly of Pennsylvania), conformably to their agreement; and, if he had refused to join with her, a Court of equity (if such a Court had existed here), would, on her application, have compelled him to carry their agreement into execution. It is a lamentable truth, there is no Court clothed with chancery powers in Pennsylvania; but equity is part of our law, and it has been frequently determined in the Supreme Court, that the judges will, to effectuate the intention of the parties, consider that as executed, which ought to have been done. This is also a rule in the Court of Chancery in England.

Why may not her articles of agreement, or deed of 1774, be

considered as a covenant to stand seized of her real estate for the uses therein specially mentioned, and also to the use of her will or appointment? Marriage, which tends to join the blood, is one of the considerations held sufficient to validate such a conveyance. Why should she not have a right in equity, of disposing of her lands, as incident to her ownership? For she is to be taken, as to the execution of this power, as a feme sole. If the intention of the parties cannot take place by this deed and appointment, in the common way of their operation, they may be considered good in some other way; and the substance, and not the form, ought principally to be regarded. Why may not this case be considered, under all its circumstances, of equal operation as a deed executed by the husband and wife, in her life time, to the use of the persons named in the appointment? The Court of Chancery will supply forms, where there is a meritorious consideration. It has gone as great lengths as is desired in the present case; and, I am glad to find the last cited case determined there, to be in point, "that there is no difference between a legal and an equitable interest." Ambl. 565. *Rippon vs. Dawding*, decreed by Ld. Chancellor Camden, in 1769.

The spirit of the case, *Wright vs. Lord Cadogan, et al.*, in 6 Brown's Parl. Cas. 156, also implies this doctrine. From all the circumstances of this case, taken together, I am of opinion the appointment of Margaret Henderson passes this estate in equity, and that judgment be given for the defendant.

Shippen, J. I must confess when this case came first to be argued before us, I was of opinion against the defendant. The old distinction between trusts and legal estates, as to a wife's power of appointment, in pursuance of marriage articles, struck me forcibly. Upon a more deliberate consideration, I now think otherwise; and that a Court of Equity, under circumstances similar to the present, would decree a specific execution of the instrument executed in nature of a will. The legatees of Mrs. Henderson cannot, with propriety, be considered as volunteers. The case of *Rippon vs. Dawding*, fully establishes the right of the defendant, and settles the doctrine on the principles of sound sense. That decision appears to me perfectly consonant to the genius and spirit of the laws of this government; and I am happy to find the authority of the case is now established. I concur in opinion, that judgment be given in both actions, for the defendant.

Yeates, J. If the present question, respecting the validity of the will, or appointment of Mrs. Margaret Henderson, came be-

fore us as a mere Court of *law*, there could be little doubt in the case; for it is contrary to the statute of 34 and 35 Hen. 8, cap. 3, that a feme covert should make a will. The statute declares that such wills shall not be good in law.

In the case of the lessee of *Thornbury vs. Dew* (vide 1 Brown's Chan. Rep. 383), determined in C. B. on a case made, Lord Chief Justice Willes says (Ambler 628), "At *law*, the husband may give his wife, by articles before marriage, a power to dispose of her personal estate, because, by marriage, he hath the sole property in, and power over it; but it is otherwise of lands of inheritance belonging to the wife, and he cannot give her such a power to make a will, in prejudice of her heir at law."

We are not, however, to judge of this case by these strict rules. Equity forms part of the law, and to prevent a failure of justice, there being no Court of Chancery, this Court has adopted, in a variety of instances, the chancery decisions. Such was the case in *Pollard vs. Shaeffer*. Dallas 213, 214. *Galbraith's lessee vs. Scott*, and many others.

A rule has long been adopted in Courts of Equity, that "what ought to be done, shall be considered as being actually done." 3 Wms. 215. And though this Court cannot compel the specific execution of an agreement, they will in certain instances, consider articles of agreement to convey lands, as a conveyance executed, where the covenants on the part of the vendee have been fully complied with. The reason of this rule applies most strongly in the case before the Court, for there was no competent jurisdiction within the government, to which Mrs. Henderson might have applied during her second intermarriage, to have enforced her husband, Matthew Henderson, if reluctant, to join with her in a conveyance of these lands, agreeably to the terms of their marriage articles; no laches, therefore, in this particular, is imputable to her.

In the case of *Peacock vs. Monk*, 2 Vez. 191, Lord Hardwicke doubts whether a feme covert can convey her real estate, but either *by way of trust*, or of *power over an use*, but not by bare agreement, which can only bar tenancy by courtesy, *unless perhaps it is such as would be decreed to be carried into execution*.

Lord Kenyon, in the case of *Hosdsen's lessee vs. Staple*, in 2 Term Rep. 695, in speaking of the opinion of Lord Hardwicke, says, "That which was then considered as a doubt, no longer remains so. For in *Wright vs. Lord Cadogan*, and others, it was determined, that a Court of Equity would compel the heir to make a conveyance to the party in whose favor such an agreement was made. That point was very ably discussed in

the House of Lords, on the doubt which Lord Hardwicke had thrown out in *Peacock vs. Monk*, though his doubts were not sufficient to induce the house to determine against such an agreement."

The case of *Wright vs. Lord Cadogan et al.* and Lord Nottingham's decree on the 13th November, 1764, is reported in Ambler, 468, and the arguments of counsel and affirmance of his decree in the House of Lords, on the 8th December, 1766, in 6 Brown's Parl. Cas. 156; in Powel on Contracts, 67, and in his late edition of Wood's Conveyancing, Vol. I. pa. 467.

In Ambler, 565, *Rippon vs. Dawding*, called in Powel on Contracts, 73, *Rippon vs. Hawden*, and in 2 Brown Cha. Rep. 539, *Rippon vs. Hardy*, determined by Lord Camden, on the 22d November, 1769, occurs, which fully meets the case before the Court. There a widow being seized of a freehold estate, her second husband, previous to their marriage, gives a bond, empowering her to dispose of her real estate by deed or will, notwithstanding her coverture. No settlement appeared to have been made on the occasion, nor any other transaction passed but the bond. The wife afterwards, by will, gives her estate to her younger children in fee. On a bill brought by the younger children against the daughter (being the only child) of the eldest son, to have a conveyance of the estate, it was objected, that the case differed materially from *Wright vs. Lord Cadogan*. In that case the legal interest was in trustees; in this, the legal interest remained in the wife, and nothing passed by the devise, and that this was a mere question between volunteers. Lord Camden said, the agreement was made on marriage, and it was not a question between volunteers. The wife might have compelled the husband to have joined with her in a fine, though the wife had only an equitable interest in the one case, and the legal interest in the other, yet the principle of the determination is the same in both; equity follows the law. A conveyance was therefore decreed.

It must be confessed that the principles of this decision are somewhat impugned by Lord Thurlow in *Hodsden vs. Lloyd*, and *e contra* (2 Brown's Cha. Rep. 534), determined in 1789. The case of *Rippon vs. Hardy*, as it is called, is cited by counsel, pa. 355, but the chancellor does not mention it. In pa. 544, he is made to say, "With regard to *chattels*, both real and personal, the husband, by contract, anterior to the marriage, resting only in agreement, could authorize her to make a will; but in order to make a will of *real estate*, he must *part with the legal estate to trustees*; for by *agreement*, whilst resting in agreement only,

he cannot bind the heir, but can only bind himself, and the legal estate ought to be conveyed by legal conveyances."

Mr. Powel, in his late edition of Wood's Conveyancing work of considerable merit, but which is not yet fully completed seems to discard the doubt he had entertained of the resolution in *Rippon vs. Hawden*, in his Treatise on Powers, pa. 73, b subjoining a *quære*.

In Vol. I. pa. 467, of this late work (Wood's Conveyancing) he says, "It was formerly doubted, whether marriage was not such a suspension of the capacity of the wife to execute an effective conveyance of her property, as deprived her of the power of assenting to any alienation even of real estate, under settlement to her separate use, unless through the medium of a power, or by the interposition of a fine. But it is *now settled* that a wife has a capacity by her consent, of making a valid contract as to her separate estate; and that therefore a *mere covenant or agreement between a woman and her intended husband*, inserted in marriage articles, that she shall have power to dispose of her real estate, *without any estate being vested in trustees*, out of which an appointment, by virtue of the power, may enure, will bind her heir, not only when the power attaches upon a trust, but likewise when it is applicable to a legal estate."

"This was settled as a trust in the case of *Wright vs. Lord Cadogan and others*," which he proceeds to state very fully with all its circumstances.

He then adds, pa. 468, "But the case of *Rippon vs. Hawden*, 23d November, 1769, which was attended with none of the particular circumstances that occurred in the former case, settled this point in favor of a covenant, in case of a legal as well as of a trust estate."

And he then states the case and decree.

If this adjudication is considered as a rule of decision, it puts an end to the present controversy. And what solid, substantial distinction is there since the stat. of 27 Hen. 8, cap. 10, between an equitable interest in an use, and a legal estate? At common law, *cestui que use* had no power over the land, though he might alien the use (Gilb. Law of Uses, 26). But the stat. of 27 Hen. 8, c. 10, *executes* the use; that is, it conveys the possession to the use, and transfers the use into possession, thereby making *cestui que use* complete owner of the lands and tenements as well at law as in equity (2 Black. Com. 333). Courts of equity now consider trust estates as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law.

(2 Blackst. Com. 337.) Trusts are to be governed by the same law, and are within the same reason as legal estates. Per *Ld. Cowper* (2 P. Wms. 713); and *Sir Joseph Jekyl*, in the same page, says that trusts and legal estates are to be governed by the same rules, is a maxim which has obtained universally.

Upon the whole, I think, on principles of equity, the appointment of *Mrs. Henderson*, in pursuance of the marriage articles, will well operate on the lands in question, and that judgments should be entered in both suits for the defendant.

Bradford, J. In this case, the *legal* estate is clearly vested in the plaintiff. The instrument under which the defendant claims is void as a will, and the articles do not *at law* raise any estate upon which it can operate as an appointment, or as the execution of a power. But it is said, a Court of Chancery would relieve the devisees, and on a bill filed against the plaintiff, would compel him to convey to the defendant.

Here it must be premised, that with regard to *equitable* relief, this Court exercises only a borrowed jurisdiction. It was established at first as a mere Court of *law*; but necessity has obliged the judges to adopt the maxims and principles of a Court of Equity among the rules of their decision. This necessary assumption of power seems now to be sanctified by the constitution, which recognizes "the powers heretofore usually exercised by them." That which is an established rule of property *in equity*, must therefore be considered in Pennsylvania as such *at law*; but I think they ought to be *settled* and *established* rules before we adopt them in any case.

From the authorities already mentioned, it appears to me, that it is now an established rule in equity, that articles executory will raise a power to a feme covert over an estate, legal or equitable, as much as a conveyance executed. Whatever doubts I entertained at first of the authority of *Rippon vs. Hawdin*, they have been removed by the full examination which *Powell*, in the passage cited by *Yeates, J.*, has given it; and his declaration, that the doctrine it contains is now considered as a *settled* point. To this may be added the uncontradicted assertion of the attorney general, in *Hodsden vs. Lloyd* (2 Brown's Cha. Rep. 540), that there is no distinction as to the power of a feme covert, whether the estate be a legal or a trust estate.

But admitting the authority of that case, it is said that the devise there was to children, who are never considered as volunteers; but that this is a voluntary disposition, and that chancery will not, in such case, compel the heir to convey. Considerations of this kind weighed with Lord Northington in *Wright*

vs. Cadogan (Ambl. 474), who distinguishes it from *Bramhall vs. Hall*, by observing that the appointment was to children, and therefore meritorious. They are also hinted at by Justice Buller in *Compton vs. Collinson* (2 Brown's Cha. Rep. 388). But it is plain, that this formed no part of the principle which governed Lord Camden's decision. He lays no stress on the merit of the *appointment*, and regards only the consideration of the *agreement*; and the object of the agreement being to vest a power of disposing of her estate in the wife, that object ought to be supported against the heir as much as against the husband. A defective appointment will not be supplied, unless it be what is called a *meritorious* one; but the question before us relates not to the formality of the appointment, but to the creation of the power; and the articles intended to raise that power are founded on the *best* of considerations.

The last difficulty which occurs is, whether these articles are to be considered as *executory* articles, within the meaning of the cases cited. Where the husband covenants to make a settlement or conveyance, which, if made, would give the wife a power over her estate, the rule of "considering that as done which is agreed to be done," has a force which it has not in the case before us. In *Wright vs. Cadogan*, the husband covenanted to execute conveyances in trust, and these, if executed, would have raised a power in the manner the law prescribes. *Rippon vs. Hawdin* is imperfectly stated, but it is said the husband covenanted to "*empower* his wife to dispose of her estate."

In the articles before us, the husband and wife do not covenant to do any thing. They discover no intention to *convey* the estate, so as to create a trust, or raise an use, over which she might have a power. It is a mere agreement, that the wife shall have a power to dispose of her estate, notwithstanding her coverture, without attempting or intending to do any thing further in order to raise that power.

The question, therefore, is brought to this, whether the *mere consent* of the husband can give the wife such a power? Upon the best consideration I can give the subject, I am of opinion that where that consent is anterior to, and in consideration of, marriage, it will raise a power without more. The expressions of Powell are full to this point. He says: "It is now settled that the wife may acquire a capacity to dispose of her property by a *mere covenant or agreement between her and her intended husband*, inserted in marriage articles, that she shall have power to dispose of her real estate." This is putting the doctrine upon broad and liberal ground. I see no reason why a woman, when she is *sui juris*, may not, by such an agreement,

reserve the rights of a feme sole over her property after marriage; nor why the consent of her husband to waive the marital rights, should not give her such a power over real as well as over personal estate. It is easy to foresee the consequences of this decision; but it seems fully justified by the later authorities, and I am perfectly satisfied with the justice and policy of it.

Judgment *pro def. per totam Curiam.*

REPUBLICA *vs.* CATHARINE KEPPELE.

Guardian cannot bind out his ward as a servant until he is sixteen years old; nor can a parent transfer the personal service of his child to another, for money paid to himself, and thereby make him such other's servant.

A HABEAS CORPUS *ad subjiciendum* had been awarded by the Court to Mrs. Keppeler, returnable *instantly*, under the act of assembly of 1785, to bring the person of Benjamin Hannis before the Court.

It appeared, on the return, that on the 22d day of December, 1789, the said Benjamin Hannis, with the consent of his guardian, Peter Dehaven, was bound by indenture as a servant to the said Catharine Keppeler, before Matthew Clarkson, esq., mayor of the city of Philadelphia, for five years; that she covenanted, by the said indenture, to give him a quarter's schooling, and two suits of clothes when his time was expired, one whereof to be new.

It was admitted that, at the time of executing the indenture, the boy was nearly eleven years old.

Mr. Sergeant, for the mistress, insisted that the invalidating the present indenture would be attended with many public ill consequences, there being many such bindings within the state. Servitude by indenture is founded on the immemorial usage of Pennsylvania; and it is well known that apprentices to trades will not be received at very early years. It is of importance to poor and indigent families, that indentures of servitude like the present should be established, instead of their children being brought up meanly, and in habits of idleness and vice; they are thereby secured a proper and comfortable maintenance and necessary schooling during their tender years, and their minds and persons kept in a state of employment, until they become of the age of fifteen or sixteen years, when there can be no difficulty in providing them with proper masters to take them as apprentices. But when it comes to be known that, after a boy has been two or three years with his master, he can then be discharged from his servitude, when the residue of his time is be-

come of some use and value, no one will receive poor children under such circumstances.

Mr. Lewis, for the boy, urged that servants were considered in Pennsylvania, in a very degraded state. If they run away they shall serve five days for one. If they deal with other persons, they shall make satisfaction by servitude, to double the value of the goods. If they marry, they incur an additional servitude of one whole year after their time by indenture is expired. If they set fire to the woods, they shall be whipped with twenty-one lashes, &c. The difference, then, between them and apprentices is sufficiently obvious.

It is admitted that there is no act of assembly directing the binding of servants. It was thought necessary to make one, to validate indentures of apprenticeship entered into by minors. This is not a binding by a father or mother, but by a guardian. The Orphans' Court may direct guardians to bind out minors apprentices; but could they do it, as servants?

The contracts of infants are, in general, voidable, unless in a few cases, and one of these instances is put that he may bind himself apprentice, by deed indented, for seven years. 1 Black. Com., 465, 466.

Even poor children are bound out, with the assent of the overseers of the poor and approbation of two justices, *as apprentices*, under the act of 29th September, 1770 (New edit., 380); and surely a guardian should not bind out his ward as a servant, where he is subjected to such severe penalties. Though it may be doubtful whether a parent, under some peculiar situations, can transfer the natural right which he has to his child's service during its minority, this power can never be thought to be lodged in a guardian; nor will any custom or usage of Pennsylvania warrant such a procedure.

The Court took some little time to inquire into the custom and usage which had obtained as to binding of servants, and now delivered their opinions.

M^r Kean, C. J. The original binding of servants by indenture seems to be founded on immemorial practise, which it would be dangerous now to overturn. The stat. of 5 Eliz., c. 4, §§ 42, 43, clears up the doubt that an infant may bind himself as an apprentice, which seems to show that it might have been done at common law.

[*Quære*, if this must not be understood of a compulsion by the means prescribed by the stat. of 5 Eliz., c. 4; for neither by the

common law, nor by the words of this statute, shall a covenant or obligation of an infant for his apprenticeship bind him. Vide Cro. Car. 179. 1 Burn's Just. Apprentices, 62.]

Though a parent may have a right to the personal service of his child, yet he cannot transfer it over to another, for money paid to himself. Such indentures have been often ruled bad. I know that negro and mulatto children have been often bound out as servants, but I have never heard of a guardian binding out his ward as such, nor do I take the present indenture to be good; and I am therefore of opinion that the boy should be discharged.

Shippen, J. I fully agree that parents cannot *sell* their children; but in certain cases, they may perhaps transfer their right to their service, and may possibly bind them as servants, where the covenants appear on the face of them to be beneficial to the child. Of this I am confident, that in many instances, the binding of a child as a servant would be more advantageous to him, and conduce more to his future welfare, than the bringing him up in idleness and vicious habits. But this is not the question before us, nor would I be thought to give a decided opinion on this point. I agree that the present indenture cannot be supported, on the custom and usage of the government. A guardian cannot have the power of putting his ward in the degrading situation of a servant, and therefore the lad must be dismissed.

Yeates, J. Upon a *habeas corpus* returnable before me about sixteen months ago, prosecuted by one Robert Steel, against his master, Robert Forsythe, I looked fully into the law on the subject before us. I also made inquiries into the usage of Pennsylvania respecting the binding of servants. I find it has been resolved, that neither at the common law, nor by any words of the statute of 5 Eliz., a covenant or obligation of an infant for his apprenticeship shall bind him. Cro. Car. 179. Much less shall the covenant of an infant bind him as a servant, unless warranted by the custom which has prevailed. That custom in the case of minors, I found to be very generally confined to the cases of servants imported from Europe, and accordingly in the instance of an imported servant, I validated an indenture voluntarily executed by one, under twenty-one years of age.

There may be a few exceptions of parents binding their minor children in this state as servants, but I never considered such indentures within the usage, or the power of the parent, or as good in law. *A fortiori*, the present indenture cannot be deemed valid; and I have no difficulty in declaring that the

practise does not warrant a guardian to bind out his ward as an indentured servant until he is sixteen years old; and therefore the boy must be discharged from his mistress.

Bradford, J. The commitment of this infant is justified under the act of 1700, respecting servants; and if he be not a *servant* within the meaning of that act, he must be discharged, whatever the nature of his contract may be.

It is clear, that this indenture of servitude cannot be supported upon principles of common law, or by the express words of any act of assembly. But it is said to be justified by the custom of the country; and as it is evident that a custom respecting servants is referred to in our laws, I have endeavored to ascertain its original extent.

This custom seems to have originated with the first adventure to Virginia, and to have arisen naturally from the circumstances of the country. Persons desirous of coming to America, and unable to pay for their passage in any other way, shipped themselves and their children as servants. If they were imported under indentures, they were to serve according to covenant; but if without, they were to serve *according to custom*, viz.: five years, if of full age, or above seventeen; if under that age, till they were twenty-four years old.

The early laws of Virginia and Maryland speak of these servants thus imported. They are called "servants according to custom, servants bound to serve the accustomary five years, and servants sold for the custom."

These servants by various laws were reduced to a very degraded situation. They were a species of property, and held a middle rank between slaves and freemen.

It appears by all the early regulations on this subject, that the custom extended to imported *servants* only; and it extended to all such as were imported, whether they were minors or not. It was founded *in necessity*, and was mutually beneficial to the colony and to the emigrant. But no such necessity existed as to the children already in the country; and a striking distinction is made by our laws between these two classes of minors. They describe the time that *minors imported* shall serve; Acts of 1682, ch. 1; and they direct that all the children *in the province* shall at the age of twelve, be instructed in some useful trade or skill. (Ib. ch. 112.) This policy is carried into our poor laws and those which relate to orphans. Overseers of the poor and the Orphans' Court have no power to bind out minors as servants, even such as are the objects of public charity must be bound as *apprentices*. The children of free negroes and mulattoes might

formerly be bound to service. (Act of 1725, § 4. New edit. of Laws, 144.) But an express provision of this kind confirms the general rule.

There have been, no doubt, some scattering instances of such binding as that before us ; but this has not the characteristics of a good usage. It has not been *generally* used and approved. The Courts of justice have always frowned on the attempt.

It is not necessary to determine how far a parent may transfer the right which he has to the service of his children, in consideration of their being educated ; nor whether the Court would interfere to take the child out of the custody of the person with whom he places them. But it is right to be decisive, and say that no parent can make his child the *servant* to another. The parent cannot transfer an authority he has not himself, an authority to commit the minor to prison if he deserts the service, or a right to be compensated by five days' service for every day's absence. Such a contract, which would subject the infant to the severe penalties of our laws, and to be sold to any one that will buy his service, cannot be for his benefit ; and the principles of the common law, which will not suffer an infant to bind himself with a *penalty* even for necessities, will apply in full force to such a contract as this.

I therefore concur with the rest of the Court, that the boy must be discharged.

APRIL TERM, 1793.

PRESENT — M'KEAN, CHIEF JUSTICE,— SHIPPEN, YEATES, AND
BRADFORD, JUSTICES.

THOMAS NOKES, LESSEE OF WILLIAM MORRIS, vs. JOHN SMITH

Lands aliened *bona fide* by the heirs, are subject to the debts of the ancestor. The old mode in Pennsylvania, of docking intalls, was by selling the lands for the debts of the testator.

THIS cause came on to trial on the 31st March, 1792, when a verdict was taken for the plaintiff, subject to the opinion of the Court, on the following case:—

John Hunt died seized of the lands in question but not having taken the oath, or affirmation of allegiance, was disabled from making a will, by the act "for the further security of the government," passed April 1st, 1778. He left issue, one son and two daughters, and appointed Rachel Hunt and Henry Hale Graham his executors. His son, some years after his death, sold the premises, for a valuable consideration, to William M'Cullough, whose executor leased the same to defendant. Thomas Corbin afterwards obtained judgment against Hunt's executors for a *bona fide* debt, due to him from Hunt, and the premises were duly sold and conveyed, by the sheriff, to the lessor of the plaintiff.

The point reserved for the opinion of the Court was, whether lands aliened *bona fide* by the heir, were subject to the debts of the ancestor.

It was admitted that the plaintiff must necessarily recover one moiety of the premises, the daughters not having joined in the conveyance; but if the deed of the son prevailed, then judgment, as to the other moiety, must be given for the defendant.

The Court desired the counsel for the defendant to begin.

Whereupon it was contended by them that the doctrine insisted on for the plaintiff, was pregnant with all the dangerous consequences of secret uses. 2 Bl. Com. 331. No one could make a purchase of lands with any degree of safety. How many multiplied liens must be immediately created upon the successive deaths of several ancestors and heirs?

It was laid down as a rule, that wherever liens are introduced by statute, means are always provided to furnish the purchaser

with information, as a matter of record, or some act of public notoriety.

A purchaser for a valuable consideration without notice, shall hold the land discharged of any trust or confidence. 3 Bl. Com. 329. So if tenant in tail becomes indebted to the king, by judgment, recognizance, obligation, or other speciality, and dies, and before any process or extent, the issue in tail *bona fide* aliens the land in tail, the land shall not be extended by force of the act of 83 Hen. 8, because the purchaser is a stranger to the debts of tenant in tail. 7 Co. 21. b. By stat. 27 Hen. 8, c. 16, bargains and sales shall not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the Courts of Westminster Hall, or with the *custos rotulorum* of the county; though it is otherwise as to chattel interests. 2 Bl. Com. 338.

Formerly, when the universal method of conveyance was by livery of seisin, no gage or pledge of lands was good, unless possession was also delivered to the creditor; and the reason was, to prevent subsequent and fraudulent pledges of the same land. Ib. 159, 160.

The statutes of fraud cannot receive too liberal a construction, or be too much extended in suppression of fraud. But notwithstanding the general words of the stat. 13 Eliz. cap. 5, such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore the statute does not militate against any transaction, *bona fide*, and where there is no imagination of fraud. And so is the common law; per Lord Mansfield. Cowp. 434.

By the common law, if the heir before an action brought against him, had aliened the assets, the obligee was without any remedy. 3 Bac. Abr. 26. So if the heir aliened the lands before the writ, and took them back again, the lands shall not be charged, because he is in of other estate. 7 Vin. 147. pl. 3, in margin. And the stat. 3 and 4 Will. and Mar. c. 14, which was made to prevent this injury to creditors, contains this express provision, that the lands *bona fide* aliened by the heir at law before the action brought, shall not be liable to execution. And it has been determined by Lord Macclesfield, that the person of the heir is the debtor, and not the lands; and, consequently, the lands in the hands of an alienee can be charged with nothing but what is an immediate lien thereon, which a bond is not. Prec. Cha. 512.

It was further urged, that the acts of assembly respecting intestates' estates, as to this point, must be construed strictly. A purchaser of lands from an heir, without notice, and the creditor

of the ancestors, are in equal equity. The act of assembly of 1791, Will. 3, pa. 7, directs, that "all lands within this government shall be liable to sale upon judgment and execution obtained against the defendant, the owner, his heirs, executors, or administrators, where no sufficient personal estate is to be found. These words do not create any lien on the land, until judgment. The lien, in equity, takes place from the judgment. 3 Term Rep. 370. All the words of the law may be satisfied by a reasonable construction. The owner of lands may sell them even after suit brought, and immediately before judgment. So may the heir, and in both instances, they will pass unincumbered to the purchaser.

The act of 4 Ann. cap. 38, p. 49, contains the same expression in effect, and should receive the same construction.

The act of 4 Ann. c. 21, p. 33, directs, that the Orphans Court, in each county, shall distribute the *surplusage* of the estate of any person dying intestate, after all debts, funeral and just expenses of every sort first allowed and deducted, in a particular manner.

But it is evident, that this surplus respects as well personal as real estate; and it will not be pretended, that if executors or administrators, sold goods or mere chattel interests in the course of administration, that the creditors of the deceased could recur to the property in the hands of the vendees. Why should not lands receive the same construction? The 8th section of the act (p. 35), lays no additional restraint in the case of real estates. It only determines the cases of children, or heirs at law, entitled to the lands. It does not respect the cases of purchasers. Suppose one by will appointed his executors, or trustees, to sell his whole estate; and, pursuing the language of this law, directed that (after payment of his just debts, funeral and other just expenses), the surplusage should be distributed in a certain mode; and afterwards, the executors or trustees sold the same *bona fide*, but embezzled the money eventually in violation of their trust. Will it be said that the fair purchasers are to be affected thereby?

There are only two instances, that we know of, which can be put in England, analogous to the point before the Court; 1st, when personal property is sold for payment of debts; 2d, where lands are sold charged with the payment of debts.

As to the first instance, it has been repeatedly determined, both in law and in equity, that no creditors can follow goods aliened by executors or administrators for a valuable consideration without fraud; because a purchaser has no power of knowing

the debts of the deceased, and if such purchases should be controlled, no one would venture to buy. 1 Atky. 463.

As to the second instance. One devises his real estate to trustees, to sell and pay his own and his father's debts and legacies, and the residue to his two sisters. No particular debts were specified in the will, but legacies to the residuary devisee and others to a considerable amount were given by both their wills. The trustees sell great part of the estates, and embezzle the money without discharging the debts and legacies; the rest of the estate was possessed by one of the residuary devisees. Decreed, that where there is a trust or devise for payment of debts generally, a purchaser is not obliged to see to the application of his money, as he is where there is a schedule, or particularizing of the debts. Amb. 188. But where an estate by will is charged with payment of debts generally, if the devisee sell pending a suit by creditors for sale and payment of debts, such alienation is void; because the jurisdiction of the Court being attached, it would be inconvenient to permit a sale but by the Court. Ib. 676. One devises all his real and personal estate to G, his heirs, executors, administrators, and assigns, charged with the payment of his debts; the plaintiffs, who were bond creditors, never asked for their principal, but received their interest regularly for sixteen years, of G, the executor, who, during this interval, made several sales of the testator's estate: held, that the purchasers should not be disturbed, after a quiet possession of sixteen years. 2 Atky. 41.

If lands are devised to be sold for payment of debts in a schedule, the purchaser is bound to see the purchase money applied to the payment of those debts; but if the trust be *general* to pay debts, though he has notice of them, yet the purchaser is not obliged to see the money applied. 1 Vern. 301; 2 Cha. Cas. 115; 1 Equ. Cas. Abr. 358, pl. 1, 2.

In the state of New Jersey, the intestate laws, as to the point in question, bear a strong similitude to those of this state (vide New Jersey laws, passed December 1742, pa. 129). A remarkable case happened in that government. One Thomas Leonard, of Princeton, died possessed of a considerable estate. He devised his lands to his nephews, who afterwards sold them, and by their extravagance soon consumed the purchase moneys. A creditor of the testator obtained a judgment against his executors, and attempted to recover the same, by seizing in execution the lands sold by the devisees; but on full argument, he was prevented from doing it by the Court.

The argument *ab inconvenienti*, holds equally strong in case of a *bona fide* purchaser of lands from the heir without notice,

as in the case of a creditor of the ancestor, who lays by, without taking the proper steps for the recovery of his debt. There are already many liens on lands, created by the municipal law of the government; they should not be increased by the introduction of constructive ones, for no human prudence can guard against them; and it is of the utmost consequence in an infant country, that the sales of real estates should not be fettered further than is absolutely necessary for the common welfare.

The counsel for the plaintiff insisted that the point before the Court had been fully settled by the decision in the Common Pleas of Philadelphia county, in the case of *Graff vs. Smith's administrators*. Dallas, 481.

They urged, that the policy of England differed materially from that of this state. The system of the former went no further than to the aggrandizement of eldest sons. The first institutions of our government wore a very different aspect. By the laws agreed on in England, between the governor and first adventurers in 1682 (Append. pa. 4, § 14), it was declared that all lands and goods shall be liable to pay debts, except where there is legal issue, and *then*, all the goods and one-third of the land only. By the act of 1688 (Append. pa. 10, cap. 189), lands were made liable to pay debts. By the act of 1693 (Append. pa. 13), all estates, real and personal, which any person had in this province and territories at the time of his decease, shall be liable to be seized and sold for the payment of the just debts of the deceased person's, so far as the same shall extend; and after all debts are paid, the surplusage of the real and personal estate to be distributed in a certain manner.

By the act of 1700 (Append. pa. 16), all lands shall be liable to be seized and sold for the payment of decedents' just debts; and where the testator's or intestate's personal estates are sufficient to pay all debts and damages owing by them respectively at the time of their deaths; with all charges incident thereunto, then the real estates to be disposed of and distributed in a particular mode.

The act of 4 Annæ, § 8, pa. 35, directs that the surplusage or remaining part of intestate's lands not sold, or ordered to be sold, shall be divided between the intestate's widow and children, &c. The intention of the legislature is here manifest, that until the debts of the decedent are paid, the heir is entitled to the lands only *sub onere*.

The counsel for the plaintiff were stopped by the Court.

M'Kean, C. J. The rules in England do not apply to the

case now before us. Our own acts of assembly must determine the question.

On the first settlement of the province, it was established that the lands of deceased persons should be liable to the payment of their debts. This continued until the act of 4th Annæ, when a provision was made by the legislature as to the mode by which the *surplus* of real estates was to be divided, after payment of debts and funeral expenses. In the infancy of the province the bulk of the property consisted of lands; personal property bore but a small proportion thereto, and creditors necessarily must have relied on the real estates of deceased persons as their security.

The universal opinion has been, that the lands of decedents were chargeable with the payment of their debts. Whatever my sentiments might be, if it were a recent case, I am concluded by the general opinion, the unsettling whereof would be attended with dangerous consequences. The general idea of the bar has been as I have stated, and we have been furnished with a copy of the opinion of Mr. Chew on this point, on a case put by the creditors of John Jones, who died some years before the revolution. He there says: "The constant construction of the act of 4th Annæ has been, that until payment of the just debts of an intestate, no descent or distribution can give the children an indefeasible right in the lands of the intestate; but they, and all purchasers under them, take the lands under the act, subject to the payment of the intestate's just debts, and the practise has gone accordingly."

The personal estate should be first applied to the payment of the debts of the deceased. When this fund is deficient, the lands are liable. The arguments from inconvenience hold strongly on both sides of the question; but this is a matter of mere legislative wisdom, and does not belong to us.

Shippen, J. Having heretofore delivered my sentiments on this subject when sitting as President of the Court of Common Pleas, and those sentiments being in print (1 Dallas, 481), it is the less necessary for me to be very particular in delivering my present opinion, especially as I have seen no reason to alter it.

Our ancestors in Pennsylvania seem very early to have entered into the true spirit of commerce, by rejecting every feudal principle that opposed the alienation or partibility of lands. While, in almost every province around us, the men of wealth or influence were possessing themselves of large manors, and tracts of land, and procuring laws to transmit them to their eldest sons, the people of Pennsylvania gave their conduct and

tent the said J. M. then and there craftily and subtly to deceive and defraud, under pretense of execution and satisfaction of the said agreement, did then and there deliver to him, the said J., before he became bankrupt, fifty dozen bottles of liquor as and for fifty dozen bottles of port and claret wine, and did then and there declare to him, the said J. M., that the said fifty dozen bottles contained good and merchantable port and claret wine, when in truth, and in fact, the said liquors therein contained, at the time of the delivery thereof, or at any time since, were neither port nor claret wines, but some vile and unwholesome mixtures, corrupt, sour, and hurtful to man's body, which the said M. then and there well knew."

The second count stated that "Whereas, also, the said M., afterwards, to-wit: the same day and year, at the county aforesaid, in consideration that the said J., before he became bankrupt, and before the same day and year, at the special instance and request of the said M., had bargained and sold to him, the said M., a certain other tract of land, of the value of 75*l.*, situate in B. township, aforesaid, he, the said M., bargained and sold to the said J., before he became bankrupt, other fifty dozen bottles of liquor; and, upon the same bargain and sale, the said M., falsely and deceitfully did declare, and affirm to the said J., that the liquor therein contained was claret wine; and in fact the said plaintiffs say that the said liquor, at the time of the bargain and sale aforesaid, was not claret wine, but some vile and worthless mixture, corrupt, sour, and hurtful to man's body, which the said M. then and there well knew. By which said several deceits and misdoings of him, the said M., he the said J., before he became bankrupt, and the said plaintiffs, since he became bankrupt, have been very much prejudiced (to which said Charles Casper, Peter, and Robert, all and singular, the goods and chattels, rights and credits, of the said J., the bankrupt, were in due manner assigned, according to the form of the several acts of assembly of Pennsylvania, made and provided, concerning bankrupts, by indenture, bearing date the — day of —, 1786, at the county aforesaid, and now brought here into Court, under the hands and seals of M. C., G. H., P. B., and R. B., commissioners, by virtue of a commission of bankruptcy, under the great seal of Pennsylvania, directed to them, the said M. C., G. H., and P. B.), and have received damage to the value of 500*l.*, and therefore they bring suit, &c."

To this declaration there was a general demurrer.

Mr. Ingersol, in support of the demurrer, urged, that the suit was instituted in its present form, to take away the defendant's right to a set-off, he having a much larger demand against the now plaintiff. If the assignees had brought *assumpsit*, which they might well do, the defendant would have the benefit of a set-off. Doug. 101. Under the bankrupt act passed 16th September, 1785, § 7, pa. 647, the commissioners were authorized to assign debts due to the bankrupt for the use of his creditors, but not torts. And a party cannot, in any case of a tort, liquidate his own demand for damages, and swear to it before the commissioners. It can only be ascertained by the intervention of a jury. Doug. 563.

Mr. Moses Levy for the plaintiffs, contended, that under the assignment of the commissioners of bankrupt, the assignees might sue, as fully as the bankrupt himself might do. Bankrupt Law, § 4, pa. 646. Chattels are either in possession or in action, and both may be assigned. 2 Bla. Com. 389. All the personal estate and effects of the bankrupt may be assigned. Ib. 485. Cooke, in his Appendix of Precedents, pa. 45, gives the form of a provisional assignment by the commissioners.

Executors of a testator, and administrators of an intestate, are assignees in the eye of the law. Executors may maintain a suit against a party for a tort, but it will not lie against them. Cowp. 373. A right to a possibility, or contingent interest, not vested in the bankrupt, may be assigned. 3 Wms. 132. Fearn, 439, 440. Cooke's Bankrupt Law, 224, 225.

Suppose the case of a defendant taken in execution at the suit of one before he becomes bankrupt, and the sheriff permits him to escape; shall not the assignees recover against the sheriff for the escape, whether voluntary or negligent?

Or if one under certain circumstances recommend another to the bankrupt, as a good and solvent person, and he turns out otherwise, shall not his assignees recover? Vid. 3 Term Rep. 60.

Or if a ship is sunk by the carelessness or malice of the captain, shall the assignees of the party suffering, who is since become bankrupt, be without remedy?

Or should one maliciously tear the note of a bankrupt, whereby a considerable debt may be lost, shall the legal idea of a *tort* shield the trespasser from making reparation in damages, at the suit of the assignees?

Mr. Ingersol, in reply, said that the commissioners under § 6 of the bankrupt law, might convey or assure any lands, and therefore might assign a possibility; pa. 647. Choses in action

are within the bankrupt laws. Cooke's Bankrupt Laws, 228. But these all respect mere matters of contract. A covenant to renew a lease is not within the bankrupt law. *Ib.* 222. Cites 9 Vern. 97. Balance of accounts shall only be claimed by commissioners of bankrupt by stat. 5 Geo. 2, c. 30, § 28; Cooke, 301.

Per Curiam. The form of the action is decisive. The damages here are as uncertain as in any species of trespass, and cannot be assigned over by the commissioners. Matters of mere *tort* were not contemplated by the legislature when they enacted the bankrupt law. The assignees might, if they had thought proper, have brought *assumpsit*, and then the defendant would have had the benefit of a set-off; but, the suit in its present form, cannot be supported.

Judgment for the defendant.

ROBERT FINNEY and HUGH M'BRIDE *vs.* JOHN M'MAHON.

A party may waive a tort, and go for the money clearly due to him, before a justice of the peace.

CERTIORARI to William Montgomery, of Northumberland County, esq. The record stated the demand of the plaintiffs to be under forty shillings, and that the justice, on due proof made before him, had given judgment for the plaintiffs for seven shillings and sixpence, and costs. The nature of the demand did not appear from the record, but on the defendant's application to the justice, he had certified to the Court a state of the facts as they appeared before him on evidence. The plaintiffs had been hunting in company in the woods, and discovering a bear had fired at and wounded him. They pursued him, and when the beast could not escape from them, the defendant, in their view, came up and killed him, and forcibly retained the skin. On these facts the justice gave judgment for the plaintiffs for 7*s.* 6*d.* the value of the bear skin.

Mr. Sergeant, for the plaintiffs, urged, that the words of the act of assembly of 1715, giving jurisdiction to justices of the peace, were "any debt or demand under forty shillings," and that the term *demand* was very comprehensive in a legal sense, and that there were no exceptions in this act similar to those in the 5*l.* act. Under the act of 1746, actions of trespass *vi et armis* for taking goods, are not excepted from the jurisdiction of justices of the peace, unless where the title of lands shall any wise come in question. Province Laws, 80, 207. But independently

hereof it has been settled, that a party may waive the tort and go for the money clearly due. Cowp. 414; Doug. 132; 1 Term Rep. 387; Here the justice did not proceed to assess damages for forcibly taking the bear skin, but, conceiving the skin to be clearly the property of the plaintiffs, gave judgment for the value thereof.

Mr. Ingersol, for the defendant, contended that justices of the peace should be restrained within their proper jurisdiction. The act of 1715 (§ 2, p. 81) declares that no Court shall have cognizance of debts or demands under forty shillings; but the uniform construction has been to restrict the word "demand" to matters of contract. Justices of the peace have no jurisdiction in matters of mere trespass, nor can they assess damages. Here the tort was not waived, but was insisted on before the justice as a ground of his giving judgment for the plaintiff. The return to the *certiorari* states the action to be "in a plea of damage under 40s."

By the Court. It would be unreasonable to expect of justices of the peace a return to a *certiorari* drawn up with strict legal precision. It is obvious that they must be unacquainted with the forms of action. Care must be taken that they do not exceed their jurisdiction, but capitious exceptions must not be allowed. "Demands," in the forty shillings act, have always been restricted to those which arise *ex contractu* and not *ex delicto*; but in this case it may be fairly inferred, that the justice did not exceed his jurisdiction from his representation of the facts. The defendant took a bear skin to which he had no just pretensions. The plaintiffs demand reparation for the injury, and waiving the tort, as it may fairly be supposed, require the value of it from him. The justice gives judgment for the value, as on an implied contract. We see no reason, therefore, to annul the proceedings before him.

Judgment affirmed.

into a recognizance in nature of special bail, and that eighteen months had elapsed before his taking out the *certiorari*.

By the Court. Unquestionably the proof before the magistrat was not the legal evidence which the law calls for, where the subscribing witnesses could have been had. Had this been a debt under forty shillings, where the party had no appeal, the Court would most probably have set aside the proceedings. But here the party had a full and complete remedy, by an appeal, and we will not furnish him with an extraordinary remedy where he has neglected to use an obvious one, clearly within his reach. The great delay also which he has affected, furnishes us with an additional argument why we should not now interpose.

Judgment affirmed.

Mr. Armstrong, for the plaintiff.

Mr. Sampson Levy, for the defendant.

ABRAHAM CORNOGG *vs.* ISAAC ABRAHAM and JANE, his wife,
DANIEL CORNOGG and GEORGE GEORGE, executors of DANIEL
CORNOGG.

Referees in a suit removed by the plaintiff, may find 12*l.* due to him, and full costs.

THE administration account of the defendants had been referred at Nisi Prius at West Chester, September assizes 1791, to three persons, to report thereon, and also the balance, if any, due to the plaintiff. The auditors reported to the last term the sum of twelve pounds to be due to the plaintiff, but said nothing therein of the costs. A certificate of two of the auditors was then produced, fixing the costs on the defendant, and a certificate of the remaining auditor, declaring his sense that the plaintiff should pay the costs. The point of costs, on motion, was then re-committed to the same referees, and two of them now report that the defendants should pay the costs.

The cause was removed by the plaintiff from the Common Pleas of Chester county by *certiorari*.

Exception was taken by the defendants, that the act of assembly of 20th May, 1767, § 3, pp. 338, 339, had declared by positive words, that where a plaintiff removed a cause, the debt or damages whereof, which should be found due by default, confession, verdict, or report of referees, should not amount to 50*l.* such plaintiff shall not recover any costs of suit, and therefore the act was obligatory as well on the Court, as on jurors and referees, who could make no order against the express terms of the law.

Sed non allocatur. For though the act is binding on the Court it is not binding on jurors or referees, who might, if they saw cause, give a larger sum in damages. So in slander, though the Court are bound by the stat. of 21 Jac. 1, c. 16, and cannot increase the costs where the damages are under 40s., yet it was resolved by all the justices of B. R. and C. B., that the jury are not bound by that statute, and therefore they may give 10*l.* costs where they give but 10*d.* damages. 1 Salk. 207. Vide Cooke's Cas. of Pract. in C. B. 45. Sayer's Costs, 21.

And the same point was determined in this Court in January term, 1792, where trespass and false imprisonment was brought, and the action removed by the plaintiff, the jury on trial gave 37*l.* 10*s.* damages, and full costs, and the judgment was entered, accordingly; and on a question being afterwards made, the Court adhered to their former opinion.

Judgment for the plaintiff for 12*l.* and costs.

Mr. Sergeant, *pro quer.*

Mr. Wilcocks, *pro def.*

MOSES GORGERAT et al. *vs.* WILLIAM M'CARTY.

A judgment entered, by way of security, admits nothing; but the plaintiffs on a trial must prove their case as laid.

A nonsuit for want of testimony, on the part of the plaintiff, cannot be taken off. The mistake of the party, or his counsel, is no ground for new trial.

This action was brought on three bills of exchange, against the defendant as acceptor. Pleas, *non assumpsit* and payment, and a discharge by the bankrupt laws of France. Replication, *non solvit*, no discharge, and issues.

On the 14th April, 1790, by agreement filed, judgment was confessed by the defendant to the plaintiffs, with a stay of execution until twelve days next before the first day of next term; agreed also, that the defendant be at liberty to have a trial under the judgment, *whether anything, and how much may be due*, by the general jury.

On the 13th July, 1790, the cause was tried accordingly, and the jury gave a verdict for the plaintiffs for 91*l.* 13*s.* 5*d.* damages, with six pence costs, subject to the opinion of the Court on a point reserved and filed in writing.

This point was argued by counsel in September term, 1791, and in the succeeding term the Court pronounced their judgment in favor of the defendant. On the 16th January, 1792, judgment was entered for the defendant, *nisi*, and on the 19th January, 1792, plaintiff moved for a rule to show cause why a new trial should not be had.

It was now argued, on the part of the plaintiffs, that they were led to believe that the defense to be set up was the bankruptcy

of the defendant in France, and had come to trial fully prepared on that point; and that they were misled by the incorrect report of the case of *Morris vs. Foreman*, in Dallas, 193, that the possession of a bill of exchange is evidence of an authority to demand payment of its contents. Hence they had not come prepared to prove their taking up the bill from the last indorsee and paying them the money. They conceived their case to be similar to the execution of a writ of inquiry at bar, under the agreement entered into; and on writs of inquiry, less evidence will suffice than in other trials. After a judgment by default, a promissory note set out in the declaration, need not be proved. 2 Stra. 1149. Plaintiff was surprised with a defense on executing a writ of inquiry, and was not prepared to prove his whole demand, the Court set it aside on payment of costs. 1 Stra. 515. S. P. 2 Stra. 1149.

They insisted, moreover, that the judgment entered by agreement precluded them bringing a new action. There cannot be a nonsuit after the plaintiff has obtained a judgment, and cited 2 Rol. Abr. 134. pl. 1, 2, that a nonsuit is inconsistent with a judgment.

By the Court. We all know that it is usual at the bar to enter judgments in order to bind lands, or for the purpose of proceeding to charge the special bail, and under these judgments to try or refer the suits. In many instances, after such judgments entered for the plaintiffs, verdicts, reports of referees, and judgments for the defendants have succeeded. The special agreement to enter judgment, admits nothing; but the defendant expressly reserves to himself a liberty to try by the general jury, whether anything, or how much is due to the plaintiffs. Notwithstanding, therefore, this first judgment, entered by way of security, the plaintiffs were bound to prove their case as laid in the declaration; and their failure herein cannot be imputed to surprise. We know of no case in the books where a nonsuit entered for want of testimony, on the part of the plaintiff, at the trial, has been taken off; nor do we apprehend the mistake of the party or his counsel to be a ground for a new trial. (Vide Fitzgib. 40. 1 Wils. 98. New trial not grantable because party had failed to give other evidence to the jury through his own or counsel's mistake.)

It is material then to consider what would have been the event, in case the point reserved had been determined by the Court at the trial. It necessarily must have been a nonsuit or verdict for the defendant, and he is entitled now to either the one or the other. The case is a hard one on the part of the

plaintiffs; but we cannot innovate so far as to take off the nonsuit, in order to let the plaintiffs into a new trial.

Motion for a new trial refused, and judgment for the defendant in nature of a nonsuit.

Messrs. Rawle and Du Ponceau, *pro quer.*

Messrs. Ingersol and Lewis, *pro def.*

WILLIAM WALKER and ALEXANDER WALKER vs. JOSEPH WIL-
LARD GIBBS and WILLIAM GIBBS, garnishees of JOSEPH
WALDO.

Under the act of 4 Ann. c. 28, debts are attachable by foreign attachment; but the garnishee is not compellable to pay the money before it is due.

A judgment in foreign attachment cannot be removed by *certiorari*. *Aliter* of the *scire facias* issued on it.

The word "exclusive" in the verdict of a jury, construed "over and above" to effectuate their plain intention.

THIS action came before the Court on a case stated. It comprehended the whole of the record, and was in substance as follows:—

A foreign attachment was instituted by the plaintiffs against Joseph Waldo, in the Common Pleas of Philadelphia county, and his property attached in the hands of the defendants, together with a considerable debt due by them to him. Judgment was obtained the third Court; on which, after the execution of a writ of inquiry, a *scire facias* issued in the Common Pleas against the defendants as garnishees, returnable to March term, 1789, which was removed by *certiorari* into the Court; to July term, 1789.

The defendants pleaded to the *scire facias* thus removed, that they had no goods or effects in their hands at the time of the attachment or at any time after; on which issue was joined. Previous to the trial, the defendants were examined on interrogatories, pursuant to the act of assembly, passed 28th September, 1789 (Loose Acts, pa. 154), and admitted that they were justly indebted to Waldo, by bond, dated 17th November, 1786, for 10,000*l.*, payable on the 17th November, 1790, with interest, but denied owing him any other sums. The cause came to trial on the 24th September, 1790, when the jury found a verdict for the plaintiffs, for 1,204*l.* 12*s.* 4*d.*, exclusive of certain outstanding debts, as per list thereof filed, and of a bond from the defendants to the said Joseph Waldo for 10,000*l.*, dated 17th November, 1786, and due on the 17th November, 1790, in the hands of the defendants. Judgment was entered on the verdict, and afterwards, when the 10,000*l.* bond became due, the plaintiffs issued a second *scire facias* in this Court against the garnishees, to show

On this head it was doubted, whether the first *scire facias* could be removed without a removal of the judgment on which it was founded. The second *scire facias*, grounded on the attachment in the Common Pleas, and the judgment here on the first *scire facias* was said to be a perfect novelty. A *scire facias* cannot issue on a judgment in another Court. A *scire facias* to revive a judgment ought not to be granted, if the record be not in the Court where the *scire facias* was moved for. Trin. 24 Car. B. R. For the record is the warrant for the *scire facias*; and, if there be no such judgment, there is no ground to move for it. Style's Pract. Reg. 495 (3d ed). 4 Bac. Ab. 409.

When it appears on the face of a writ that it is bad, the Court are bound to quash it at any time. Hob. 280, 281. The plaintiffs must give bail under 4 Ann. c. 28, in the Common Pleas, where the attachment originated, that if the defendant should disprove or avoid the debt within a year and day, he would restore the money recovered; and, therefore, the *scire facias* could only issue in that Court.

To this it was answered, and so resolved, that there was no ground whatever for the doubt expressed. The judgment in the original action could not be removed by *certiorari*. The law imposed no restriction on removals of *scire facias*es founded on judgments, and this Court had always exercised the power. Such suits might be removed equally as actions of debt brought on the judgments of other Courts. But, if the law was otherwise, the exception should have been taken on the removal of the first *scire facias*. The defendants were examined on interrogatories in this Court; the trial on the first *scire facias* was had here, and a judgment had thereon, and the second *scire facias* was duly issued. This case resembles greatly that of *Dorchester vs. Webb* (Cro. Car. 373), where it is resolved, that if an executor pleads *plene administravit*, and it is found by the jury that the defendant hath some assets, although of little value, so as he hath not fully administered, the plaintiff shall have judgment for the entire debt, but he shall not have execution but of as much as is found, and shall not be barred for the residue; and, if more assets come afterwards, he may have a *scire facias* to have execution thereof. Where the plaintiffs in the attachment give security respecting the disproving, or avoiding the debt within a year and day, it must necessarily be in the original action, which, as between those parties, was only in the Common Pleas. But it does not follow that the second *scire facias*, grounded on the proceedings removed hither, and the judgment thereon, must issue out of that Court.

3. Lastly, it was insisted, that the verdict was substantially defective, and could not now be amended.

It was argued, that the verdict was insensible, and conveyed no precise clear idea. To make it suit the plaintiffs' case, the word "exclusive" must be construed to be "inclusive," which is a greater power than it was presumed the Court would assume. A verdict which finds the matter in issue only by argument and inference, is void. 5 Com. Dig. 165. And, however liberal the Courts of late years have been, as to making amendments, their powers will not be exercised in the present instance, where the plaintiffs have issued their *scire facias*, affirming the verdict as it stands.

On the part of the plaintiffs were cited the following cases: Hob. 54; 2 Burr. 699; 3 Term Rep. 349, 749, that it needs only to be understood what the intention of the jury was, agreeably to which the verdict may be afterwards moulded into form. Dall. 462.

By the Court. We see no reason why an amendment is necessary on the whole of the proceedings. The bond of 10,000*l.* was admitted by the defendants to be due from them to Waldo, by their answers to the interrogatories, which form a part of the record. The bond was not put in issue to be tried by the jury. We are to judge from the whole of the record. The verdict of the jury is plain and obvious: they find a debt to be due at the time of the trial, from the garnishees to Waldo, of 1204*l.* 12*s.* 4*d.*, "over and above" the bond which was not denied, and was not then payable, which evidently in this case was the true meaning of the jury, when they made use of the term "exclusive." Therefore the plaintiffs, in our opinion, are entitled by law to recover the balance of their demand out of the bond for 10,000*l.*

Judgment *inde.*

Messrs. Ingersol, Lewis, and J. B. M'Kean, *pro quer.*

Messrs. Rawle, Coxe, and Dallas, *pro def.*

ISAAC AUSTIN vs. THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA.

The act of assembly vesting Isaac Austin with a messuage, &c. passed 6th August 1784, adjudged to be unconstitutional.

CASE for the use and occupation of one messuage, one kitchen, two stores, one ferry landing, and lot of ground, situate on the north side of Mulberry street, in the city of Philadelphia, for the space of nine years, five months, and ten days, on a *quantum valebant*. The defendants pleaded *non assumpsit* and payment, with leave to give the special matters in evidence.

The cause came on to trial in January term, 1791, when the jury found a special verdict, in *hæc verba* :

"The jurors find, that the premises stated in the declaration, were forfeited to the commonwealth by the attainder of William Austin, and were exposed to public sale by the agents for forfeited estates, under the direction of the Supreme Executive Council, in August, 1780, and that at such sale the plaintiff was the highest bidder, but that he did not comply with the terms of the sale, nor pay the money bid for the same.

"That the premises were again exposed to sale by the said agents on the sixth of November, 1780, and that the said plaintiff was again the highest bidder, and that the same was struck off to him for 90,550*l*. but that he did not comply with, nor pay the money bid, within the time prescribed by the terms of sale; that afterwards, in December, 1780, he offered to the Supreme Executive Council to make payment by releasing a certain debt due to him and John Barry, as administrators, &c. from the commonwealth (having verbal authority from the said John Barry and Reynold Keen, so to do), and that he either offered to pay the residue, or to give security for the payment thereof, which the said council refused to accept.

"That afterwards on the 26th December, 1780, the Supreme Executive Council reserved and appropriated the said premises. [*Prout* resolve.]

"That on the 28th March, 1781, a list of the estates reserved and appropriated to the defendants was laid before the general assembly by the Supreme Executive Council, agreeably to the directions of the act of assembly establishing the University, passed the 27th November, 1779. [*Prout* act and list.]

"That the general assembly, by act passed the 22d of September, 1785, confirmed the said premises to the defendants. [*Prout* act.]

"That on the 10th of April, 1781, the house of assembly resolved as per resolution of that date.

"That on the 11th of March, 1783, the house of assembly resolved as per resolution of that date.

"That on the 5th of February, 1784, the said house voted, that they disapprove of the aforesaid resolution. [*Prout* vote.]

"That on the 6th of August, 1784, an act of assembly was passed, vesting the premises in the plaintiff. [*Prout* act.]

"That on the 9th of November, the said plaintiff paid the sum of 400*l.* to the treasurer of the state, and the sum of 316*l.* 3*s.* 3*d.* on the 12th of January, 1785.

"That on the 18th of February, 1785, the last mentioned act was repealed. [*Prout* act.]

"If upon the above facts the Court shall be of opinion, that a title to the premises was and is vested in the said plaintiff, then the jury find for the plaintiff, and assess damages to 395*l.* 8*s.* 4*d.* with sixpence costs; or otherwise, they find for the defendants."

Yeates, J. The chief justice and Mr. Justice Shippen decline to give any opinion on the special verdict, by reason of their being trustees of the University. Mr. Justice Bradford feels the same delicacy, from being formerly retained as counsel on the part of the trustees. It falls therefore to my share to deliver the judgment of the Court, though I should have been better pleased to have first heard the arguments of counsel on the special verdict.

There can be no question in this, that the plaintiffs *merely buying* the lot of ground and premises, formerly the property of his brother William Austin, from the agents of forfeited estates, did not vest the title thereto in him, without complying with the terms of the purchase. The special verdict states, that he purchased in August 1780, and also on the 6th of November 1780, but did not comply with the terms of either sale, except so far as is stated in the last sale, which certainly was no performance of the conditions under which he bought. In both instances, under the act of the 6th March 1778, he forfeited to the state one fourth part of the consideration moneys bid.

The plaintiff's claim then must be *chiefly* founded on the act of the 6th August 1784, which it is said vested the real estate of his brother in him. But the act was repealed previous to the institution of the suit, by a law enacted on the 18th February 1785, for the reasons particularly enumerated in the preamble thereof, and I have no difficulty in declaring for the same reasons, that the former act was *unconstitutional*. It is however repealed by the same authority which enacted it, and therefore the plaintiff's title cannot be assisted thereby.

If it be said that the repealing act affected a right vested in the plaintiff under the act of 6th August, 1784, it may readily be answered, that the act of 18th February, 1785, only put matters in their former situation, as they were previous to the passing of both the laws, and left the decision of the plaintiff's claim to the judicial authority.

On the whole I am of opinion, there appeared a manifest defect of title on the part of the plaintiff whereon to ground his action, and that judgment be entered for the defendants.

ISAAO ROACH *vs.* The COMMONWEALTH OF PENNSYLVANIA.

The officers of the state navy, under the resolves of the house of assembly of 12th March, 1779, and 24 March, 1779, are chargeable for clothing, &c. delivered to them in that year, only at the rate of depreciation, at the time it was delivered, according to the prices before the war. Such officers, who were honorably discharged, having accepted the commutation, are not entitled, under the resolve of 25th March, 1784, to the previous arrears of half-pay.

This cause came before the Court by way of appeal, from the settlement of the account of the plaintiff, as captain of one of the state galleys during the late war, by the comptroller and register general on 3d April, 1792.

The suit was instituted in *case*, founded on an agreement signed by the plaintiff's counsel and the attorney general filed in Court. Plea, *non assumpsit*, and payment. Replication *non solvit*, and issues.

The plaintiff demanded a balance due to him from the commonwealth, for 48*l.* 3*s.* 1*d.* for clothing deliverable to him in 1780, which he had not been furnished with. He had received a suit of uniform clothes in 1779, which not being settled for by him, it was contended, should be set off against the clothing due to him in 1780. He also demanded the further sum of 25*l.* for his half-pay from 13th February, 1781 (the time when he was honorably discharged by the Supreme Executive Council), to 1st July, 1783.

The issues were tried at the last term, when a verdict was given for the plaintiff by consent for 298*l.* 8*s.* 1*d.* (the amount of both sums demanded), and interest from 1st July, 1783, subject to the opinion of the Court on the two following questions:

1. At what rate the clothing received by the plaintiff in 1779, should be charged against him by the state.
2. Whether the plaintiff is entitled to half-pay from the time of his discharge until the 1st July, 1783.

These points were fully argued at the last term, by Messrs. Lewis, Ingersol, and Sergeant, for the plaintiff, and Messrs. Wilcocks and Dallas, for the commonwealth; but their arguments are omitted, as being fully taken notice of by the justices of the Court, in their opinions, which they this term delivered *seriatim*.

M^r Kean, C. J. The answer to the first question depends on the construction of a resolve of the general assembly, passed on the 5th December, 1778, "that all matters as may appear to the council to be absolutely necessary to the comfort of the troops of this state, be sold to them for one-fourth part of the original cost, for cash only," &c., and of another resolve of 13th March, 1779, that to every officer of the said troops, a complete suit of regimental uniform be furnished every year by this state, to be charged to the officer at the price for which the said uniform might have been purchased at the commencement of the war", &c., and of an act of assembly, passed 1st March, 1780, whereby a complete set of uniform was directed to be given annually to each officer, gratis, during the war.

Respecting this, there seems to have been a legislative construction; for it appears in the journals of the assembly of the 14th and 18th December, 1780, that the legislature would not charge the officers with clothes, &c., furnished them, with the *specie price*; from which it may be clearly inferred, the clothes that had been furnished them were to be paid for in continental bills of credit only, and under the second resolve, before cited, the price was to be regulated by the price at the commencement of the war.

Without the aid of this authority, I should have been of opinion that the clothes thus furnished the officers were to be paid for in continental bills of credit, and that this was the intention of the then assembly. Because, first, whatever might have been their private sentiments respecting these bills being depreciated, they deemed it inexpedient to acknowledge it in their public character. Secondly, because continental money was then, by law, equal to specie, and it was penal to make a distinction between them. And lastly, because it is manifest they intended to be generous to, or at least to relieve the known distresses of the officers of the state, both in the army and navy. For by the first resolve, the assembly directed that the officers should be furnished with the articles necessary for them, at a fourth part of the then original cost, for cash only; and by the second, they were to be furnished with a complete suit of regimental uniform, at the price for which it might have been purchased at the commencement of the war, intending thereby a further gratification, which at first view may appear paradoxical. Afterwards, by an act of assembly, a complete suit of uniform (the particulars of which are specified in the 8th section), was allowed to be given annually, to each officer, *gratis*, during the war. Let it be assumed, for illustration, that a complete suit of uniform, at the original cost, on the 5th December, 1778, would amount to 240*l*.

continental money, the officer, for this, was to pay a fourth part or 60*l*. The depreciation of the continental money having been since fixed by law to have been on that day 6 for 1, the specie price to be paid by the officers would be 10*l*. On the 13th March, 1779, the same specie price at the commencement of the war being allowed for a complete suit of uniform, viz: 40*l*., the officer was to pay that sum in continental money, which, according to the same scale, fixed by law, would amount only to 3*l*. 6*s*. 8*d*. the depreciation then being 12 for 1. As to this point, therefore, I think if the plaintiff is to be debited at all, it can be only for this last sum, or in that proportion.

With respect to the second question, it appears to me to be involved in obscurity and doubt; but in such a case I shall conceive it less injurious to err (if I do err) in favor of the individual than of the commonwealth, because the error against the individual may be very distressing; whereas, if against the commonwealth, it will hardly be felt, and I know I must contribute my proportion of the money awarded.

It seems to be unnecessary to cite the several resolves of congress, allowing half pay to the officers of the army of the United States, or of the assembly of Pennsylvania, on the same subject, respecting the troops of the state, as the principal ground on which our present decision must stand is the act of assembly, entitled "An act for the more effectual supply and honorable reward of the Pennsylvania troops, in the service of the United States of America," passed the 1st March, 1780. By the 15th section thereof, it is enacted that "the officers of the navy of this state, who were in service on the 13th March, 1779, and shall continue therein until the end of the present war, or until honorably discharged, shall be entitled to the allowances and benefits hereinbefore granted to the military officers, &c., respectively, of the Pennsylvania troops, as to half-pay and clothing, and to the like supply and distribution of the articles above enumerated, subject to the same limitation and conditions; the half pay of the navy officers to commence at the expiration of the present war, or their discharge." On the 25th March, 1784, the assembly resolved, "that as one of the designs in granting half-pay to the said navy officers, was to place them on a footing with the officers of the army, that the officers of the navy of this state, entitled to half-pay for life, under the resolutions of the 24th March, 1779, and confirmed by act of assembly, passed the 1st March, 1780, be allowed five years full pay in lieu thereof, to be paid at the same time, and in the same manner, that the officers of the army in the line of this state, are, or shall be paid, and that their accounts be

liquidated and settled by the comptroller general, and certificates given them."

From the foregoing it appears that a distinction has been made as to the time when the half-pay should commence between the officers of the army in the line of this state and those of the state navy. The half-pay of the former is confined to such of them as should continue in the service of the United States during the war, and was to commence at the conclusion of the war; but that of the latter was to commence at the time of their discharge from service. The plaintiff was honorably discharged from service on the 13th February, 1781, and was incontestibly entitled to half-pay from that time until the 25th March, 1784, when he commuted his half-pay for life for five years full pay. The sole question then is, whether this act of commutation has barred the recovery of the half-pay then due to him, viz: for three years, one month, and twelve days, as well as his future half-pay.

It has been contended for the commonwealth, that his accepting a certificate for five years full pay, is a bar to the arrearages; for that, by a resolve of congress of the 22d March, 1783, adopted by the assembly on the 22d September, 1783, it is directed that "with respect to retiring officers entitled to half-pay for life, the commutation, if accepted by them, shall be in lieu of whatever may be now due to them since the time of their retiring from service." On this the whole difficulty respecting the plaintiff's claim rests.

In answer to this it has been asserted (and acceded to) that the plaintiff, at the time he received his certificate from the comptroller general, as well as the other navy officers, gave him notice that they meant not thereby to relinquish the arrears of half-pay then due to them respectively; and it was further contended that the last mentioned resolve did not relate to the officers of the state navy of Pennsylvania, but to the officers of the army in the service of the United States only.

It appears to me that the clause in the resolve of the 22d of September, 1783, relates only to retiring officers of the army, and that the navy of the state of Pennsylvania was not at all then in the contemplation of the congress, or assembly. Besides, none of the officers of the state navy had retired; the plaintiff and four or five others had been honorably discharged from the service by the Supreme Executive Council of Pennsylvania. Who the retiring officers of the army were I do not well know; perhaps those who became supernumerary, or reduced in consequence of the resolves of congress of the 21st of October, 1780,

or such as had retired with the consent of the commander-in-chief, after notice of the provisional articles of peace of the 30th November, 1782. And it is at least doubtful whether the half-pay of these officers was to commence before the conclusion of the war; for those who continued to undergo the fatigues and hardships of a camp, and to endanger their lives in battle until the termination of the war, seemed to have a greater claim on their country than those who retired from the service; and on this opinion was the congress, as appears in their resolve in General Maxwell's case on the 8th August, 1780. The words in the resolve regarding reduced officers of the 21st October 1780, are, "that they are to be allowed half-pay for life;" but no mention was made of the time when it was to begin, nor did the congress make any provision for the payment of it prior to the conclusion of the war. Be this as it may, it is certain that no officers of the army in the line of this state were entitled to half-pay by any act or resolve of the assembly, excepting such as should serve till the end of the war, and that those in their navy were entitled to it from the time of their discharge. The navy officers could not be placed on a footing with the officers of the army of the state, if the latter got five years full pay in lieu of what was to become due to them for half-pay from the end of the war, and the former got only five years full pay in lieu of what was to become due to them, but also of several years arrears then past, for the payment of which they had a legislative security. Besides, the officers of the army had large bounties in lands, not only from the state but also from the United States; but the officers of the state navy had none. Could this have been the intention of the legislature? I should think not, because of the great inequality it would create, not only between their officers in the land service and sea service, contrary to their *express declaration*, but also between the latter themselves; for, by accepting the commutation, the one would lose more than another in proportion to the times they were respectively discharged. This would be so unreasonable and unjust, that unless they had expressly and manifestly thus declared, I am inclined to entertain a contrary sentiment. Their design rather appears to have been to place their navy officers on a footing with the most favored of their land officers; because they expressly allowed them half-pay from the time of their discharge, but to the others only from the end of the war. It is a pity this affair has been left so embarrassed; but the best conclusion I can form upon the whole is in favor of the plaintiff on this question also.

Shippen, J. I am clearly of opinion with the plaintiff on the first point.

As to the second point, by the resolution of assembly of the 24th March, 1779, confirmed by the act of assembly of the 1st March, 1780, the officers, seamen, and marines, employed in the service of the state, and who were in actual service on the 13th of March, last, and should continue therein until the end of the war, or till honorably discharged, were entitled to the same allowances as to half-pay, clothing, &c., as had before been granted to the land officers and soldiers; with this *difference only*, that the officers of the land army, who were allowed by congress half-pay for seven years after the end of the war, were allowed by the assembly half-pay from the end of those seven years during their lives; whereas the officers of the navy were allowed half-pay from the end of the war, or their discharge.

The navy officers were discharged on the 13th February, 1781, before the termination of the war; of course they were entitled to half-pay from that time.

On the 25th March, 1784, the resolution passed, which substituted the five years full pay to the officers of the navy, in lieu of their half-pay during life. It takes notice that one of the designs of granting half-pay to the navy officers, was to place them on a footing with the officers of the army. With this view they resolve, "that the officers of the navy of this state, entitled to half-pay for life under the former resolution and law, should be allowed five years full pay in lieu thereof, to be paid at the same time and in the same manner that the officers of the army in the line of this state are or shall be paid."

As it was the apparent intention of the assembly to put the officers of the navy upon the same footing, as to their half-pay and commutation, with the officers of the army, it is material to consider what that footing was.

By the resolution of congress of the 21st October, 1780, the retiring or reduced officers of the army were allowed half-pay, without expressly ascertaining the time of its commencement, whether from the time of their reduction or from the end of the war. Whether the words in the next clause, "from the time of their reduction" relate to the preceding clause, or are confined to the latter, may possibly be somewhat doubtful. But as there is no future time mentioned for its commencement, the very nature of the allowance, as well as common humanity to meritorious servants of the public, and the practise of other countries in such situations, all concur to show the meaning of congress must have been, that the half-pay was to begin when the full pay ceased.

terminated that their officers should be entitled to the continuance of half-pay from the end of the said seven years, for and during the life of every such officer. And on the 24th March, following, they likewise resolved, that the half-pay of the state navy officers, who continued in service during the war, should commence on the termination of the said war, and be continued during their respective lives.

These provisions were further confirmed by a law of the state enacted on the 1st March, 1780; and the 15th section thereof included the case of the state navy officers, who were declared entitled to half-pay during life, at the expiration of the war, or their honorable discharge.

On the 21st of October, 1780, congress made a new arrangement of the army, and resolved, that the officers who should continue in the service till the end of the war, should be entitled to half-pay during life; and, that the names of those officers who should be reduced by the new organization of the army, should be transmitted to congress, who were to be allowed half-pay for life.

On the 22d March, 1783, congress, in pursuance of a memorial transmitted by a committee of the officers of the several lines, soliciting a commutation of their half-pay for an equivalent for a limited term of years, or by a sum in gross, resolved, that such officers who continued in service to the end of the war, should be entitled to receive five years full pay instead of their half-pay for life, at the option of the officers of the lines of the respective states, expressed within certain limited periods; and that such officers as had *retired* at different periods, entitled to half-pay for life, might collectively, in each state, accept or refuse the same within six months, but that the commutation, with respect to such retiring officers, if accepted by them, should be *in lieu of whatever might be then due, or thereafter might become due* to them.

There is some obscurity in the penning of the resolve of congress of the 21st October, 1780, as it appears on the printed journals. As to the time from whence the half-pay of the *reduced* officers shall begin, it has been doubted whether it shall commence from the period of their *reduction*, or from the end of the war. Taking the whole of the resolution together, I am of opinion, that the period of such officers' reduction, is the time of the commencement of their half-pay for life. There is nothing in the resolve which directs its commencement from the termination of the war; and, without doing violence to the words, the latter part of the succeeding sentence, "to commence from the time of their reduction," may be well applied to the clause

preceding. To allow the reduced officers half-pay for life, and to construe its beginning from the *uncertain* termination of the war, would, in my apprehension, be doing manifest injustice to congress, and violence to their expressions; and would, in the language of Judge Burnet, on another occasion (1 Atky. 344), "reduce them to starve in the desert with the land of Canaan in their view." The words of the resolution of the 22d March, 1783, considerably strengthen this idea, and amount to a congressional construction of their former resolve, evincing their clear and decided opinion, as to the half-pay of such retiring officers commencing from the period of their reduction.

On the 9th September, 1793, President Dickinson transmitted a memorial from the officers late of the state army to the house of assembly. It is a matter of regret that the memorial cannot be found at this period. It would throw great light on the present question, as it must unquestionably convey the wishes and desires of the applicants.

The "public acts," to which the memorialists refer, are in all probability, those which I have already enumerated. I cannot bring myself to believe that they asked for more than was allotted by congress to the option of retiring officers of the army. Their cases were similar. Both classes had been promised half-pay during life, and were meritorious citizens. The systems adopted by congress and the state rendered their further immediate services unnecessary, and each were honorably discharged. It remained with both sets of officers to say, in bodies, whether they would accept of the commutation or rely on the faith of government for their half-pay during life. If it be said that the navy officers' lives were worth, in a point of calculation, a greater number of years than those officers who had continued to service until the end of the war, they beign then actually entitled in half-pay from 13th February, 1781, when they were honorably discharged by the Supreme Executive Council, still the same remark holds in the case of the retiring officers, who were deranged under the resolve of congress of the 21st October, 1780.

It appears, by the resolutions of the assembly, that the house, on the 22d September, 1783, adopted the ordinance of congress of the 22d March, preceding, in *totidem verbis*, and, on the 25th March, 1784, resolved that the officers belonging to the naval department of the state, who were discharged in 1779, should be entitled to depreciation on their pay to the time of their discharge; and that the other navy officers who were retained in the service of the state during the war, or until honorably discharged, and were entitled to half-pay during life, should be al-

lowed "five years full pay in lieu thereof, to be paid at the same time and in the same manner that the officers of the army, the line of this state are or should be paid."

The preambles to these resolutions state that the "principle of equal justice" was the ground thereof, and that "one of the designs in granting half-pay to the said navy officers, was to place them on a footing with the officers of the navy."

I apprehend, therefore, that the intention of the legislature and the true construction of the resolve of the 25th March, 1781, was to put the state navy officers who were honorably discharged by council on the 13th February, 1781, precisely on the same ground with the retiring officers of the army in 1780, under the resolve of congress of the 22d March, 1783, as to the commutation for half-pay; and that it must necessarily be intended that the five years full pay were given as a full equivalent for the whole of their half-pay; and, consequently, that the plaintiff in the present suit is not entitled to his arrears of half-pay from the 13th February, 1781, until the 1st July, 1783, as he now demands.

Bradford, J. Upon the first point, reserved for the opinion of the Court, I concur with my brethren. The second turns upon the meaning of the word, "half-pay," as used in the resolution of the 25th March, 1784. Does it include the sums which were then due to the officers of the navy, or must it be confined to such as were to become due? That is the question. In common and familiar acceptance, the expression seems to be sufficient to include both. No provision had, at that time, been made for the payment of any part of the half-pay to which they were entitled under the act of 1780, and the arrears would naturally be blended with the right itself, under the general description.

But if the *expression* be doubtful, the *intention* must be collected from the reason assigned for making this offer to the claimants. It was "to put them on a footing with the officers of the army."

The officers of the army, those who retired in 1780 as well as those who continued in service until the end of the war, had accepted the commutation in lieu of all they were entitled to under the grant of half-pay for life. The resolution of congress upon this subject had just been adopted by the assembly, and it is reasonable to suppose that the navy officers neither asked for, nor expected, more.

But it is said that the half-pay of those *retiring* officers was not to commence until the end of the war, and that therefore there is a distinction between their case and that of the navy

officers. Though I have had doubts on this point, yet on comparing the different resolutions of congress together, and considering what has been urged by two of my brethren, I am satisfied that those officers were entitled to half-pay from the time of their reduction. The clause in the commutation act is declarative of this, and *that alone* would have been conclusive in their favor if they had refused to accept the commutation, and had insisted upon their half-pay.

With this class of officers the claimants were on a footing; both had rendered meritorious services; both had been honorably discharged; both were entitled to half-pay; and the assembly were willing to put them on a footing in this new mode of compensation. If they did not mean that this commutation should be in full of all the navy officers were entitled to under the act of 1780, their silence about the arrears at that time, as well as from that time to this, cannot be accounted for.

I am confirmed in this construction by considering the grant of commutation to the hospital surgeons. By an act passed in 1781, these officers were entitled to half-pay from the end of the war. In December, 1784, they applied for commutation, and state that "this had become a general mode of *discharging the claim to half-pay*, and that the last assembly had commuted the *half-pay* promised to the officers of the navy, for five years full pay." It seems to have been the general understanding, that *all claims* to half-pay were extinguished by the commutation, and, in accepting it, some of these surgeons gave up fifteen months arrears, and others gave up more. The resolution of the assembly in their favor is copied from that under consideration, and is nearly in the same words. If the navy officers are entitled to arrears, so will the surgeons be, which has never been pretended.

I am therefore of opinion that the navy officers are not entitled to the arrears they claim; but, as they were to be on a footing with the retiring officers, their certificates ought to have borne date on the same day, viz., the 22d March, 1783, and not on the 1st July. A sum, therefore, equal to the interest on their respective certificates for that period, must be carried to their credit in making up the account.

The whole Court assented to this additional sum being debited by the plaintiff against the commonwealth, and judgment was entered accordingly for the plaintiff.

GEORGE FITZGERALD *vs.* ANDREW CALDWELL, surviving partner
of JAMES CALDWELL.

A garnishee is not liable to pay interest pending an attachment, unless perhaps, as between him and the defendant in the attachment, when he gives no notice of the attachment for a long time to such defendant.

ARTHUR VANCE, Richard Caldwell, and Robert Vance, were joint partners in trade at Dominica; Hugh Moore and Alexander Johnston, at St. Kitts. The former house was indebted to the latter; and the partnership of Andrew and James Caldwell, Philadelphia, being considerably indebted to the former, Robert Vance, surviving partner of Vance, Caldwell, and Vance, gave a letter of attorney, on the 27th of May, 1780, to George Fitzgerald, the plaintiff, to collect their debts in Pennsylvania. On the 8th of April, 1782, Andrew and James Caldwell paid Fitzgerald 6600*l.* in notes and acceptances, as attorney of Vance, Caldwell, and Vance, and gave him their note for 5000*l.*, "provided so much appeared to be due from them to the house of Vance, Caldwell, and Vance."

On the 11th May, 1782, Robert Vance gave a second letter of attorney to the said Hugh Moore and George Fitzgerald, to collect their debts in Pennsylvania, which was accompanied by a letter of the same date from the said Vance, in Dominica, to the said Moore, in St. Kitts, informing him that "he had empowered him to receive the debts wherewith to pay off the just demand against this unfortunate partnership." By another letter dated May, 1782, he apologizes to Moore for continuing the plaintiff in the letter of attorney, as he had been formerly authorized for this purpose. It appeared, by an account current stated on the 11th May, 1782, that the balance due from Vance, Caldwell, and Vance, to Moore and Johnston, was 8459*l.* 13*s.* 11½*d.* Moore arrived at Philadelphia the latter end of July, or beginning of August, 1782, and pressed the defendants for settlement. Early in 1783, several letters passed between him and James Caldwell (Andrew Caldwell being then much indisposed with the gout), and he passed one receipt to Andrew and James Caldwell for 300*l.* on account of Vance, Caldwell, and Vance.

On the 29th March, 1783, a foreign attachment was sued out of the Court of Common Pleas of Philadelphia county, in the name of John Caldwell (of Ireland) *vs.* Robert Vance, as surviving partner of Vance, Caldwell, and Vance, and their property was attached in the hands of Andrew and James Caldwell. A second attachment was sued out afterwards, on the same day, in the name of William Caldwell, and levied in the same way upon which judgments were entered in the usual course in December, 1783. Moore and Johnston sued out a third attachment on the 30th October, 1783, and levied it in like manner.

John Mitchel and ——— Gay sued out a fourth attachment on the ———, ———; Francis Feariss sued out a fifth attachment on the 23d April, 1785; and Hugh M'Cullough sued out a sixth attachment on the 10th June, 1785, which were also severally levied on the property of Vance, Caldwell, and Vance, in the hands of Andrew and James Caldwell, aforesaid. A suit was likewise brought on the aforesaid note of 5,000*l.* by one Hamilton, as indorsee of Fitzgerald, to March term 1784, which was afterwards discontinued on the 21st August, 1787, it being apprehended that the same was not negotiable.

In 1785, the house of Vance, Caldwell, and Vance failed, and their effects were assigned to their creditors.

In June, 1786, an inquisition was executed in John Caldwell's suit, and the damages were ascertained at 1,985*l.* 9*s.* 3*d.* A *scire facias* issued against Andrew Caldwell the surviving partner (James Caldwell having died in 1783) in the Common Pleas to September term, 1787, which was removed into this Court in the September term, following.

The present action was brought on the note for 5,000*l.* by the now plaintiff, for the use of Moore and Johnston, to September term, 1787, and immediately removed. A special reference was appointed therein, and a report made to October, 1790, and likewise in a suit brought by Robert Vance, as surviving partner, against Andrew and James Caldwell (removed to September term 1787); but upon a reconsideration of the said reports by agreement, the sum of 5,009*l.* 5*s.* 1*d.*, was found due from the defendant in the former suit on the note, and 4,016*l.* 9*s.* 4*d.* in the latter suit; the latter sum being calculated up to the 8th April, 1782, the former sum to the 29th January, 1791, and the reports returned to November, 1790; and 20,000 dollars in public certificates were delivered up by Andrew Caldwell, in pursuance of the opinion of the referees.

On the 6th January, 1792, the action of Fitzgerald against Andrew Caldwell, surviving partner, came on to be tried in this Court; when, after a full hearing, and the jury not agreeing in their verdict, it appearing that the matter in controversy could not be finally determined in that suit, but that the defendant might be again subjected to the payment of the money in case another jury should differ in opinion, as to the persons who had the legal and equitable interest in the money in his hands, a juror was withdrawn by consent. And under the recommendation of the Court, it was agreed by the counsel, that the *scire facias* on the attachments of John and William Caldwell should be removed into this Court, and the trials had thereon should determine whether the defendant was to have credit in those

suits for the debts due to those plaintiffs respectively ; and in case neither of those plaintiffs should recover, then Moore and Johnston to be entitled to the whole of the property attached.

In pursuance of this agreement, the cause of John Caldwell against Andrew Caldwell, surviving partner, was removed and came on in this Court at the last term, when on trial upon the plea of *nulla bona*, after full argument, the jury were of opinion that the equitable interest in the debt due from the house of Andrew and James Caldwell, to the firm of Vance, Caldwell, and Vance, was vested under the letter of the 11th May, 1782, and the other circumstances of the case, in Moore and Johnston ; and that therefore the defendant had no effects in his hands of the house of Vance, Caldwell and Vance, subject to be attached at the suit of John Caldwell ; on which verdict a judgment was entered for the defendant.

A motion was now made by the defendant's counsel, in the suit brought by George Fitzgerald, to stay further proceedings, on payment of the principal sum found by the referees, and costs.

It was contended by Messrs. Lewis, Wilcocks, and Tilghman, on the part of the plaintiff in the present action, that the defendant was bound to pay interest for the money in the hands of the company from the 8th April, 1782. And it was proved and admitted, that Andrew Caldwell, the defendant, took out the attachment at the suit of John Caldwell, and procured a person to join in the attachment bond to the sheriff ; but letters previous thereto from John Caldwell, in Ireland, to Andrew and James Caldwell, were shown to the Court, requesting them to use their endeavours to procure the debt due to him from Vance, Caldwell, and Vance, James Caldwell, one of the partners being brother of the said John. Three other letters, in 1783, before the commencement of the first attachment, were also shown, tending to prove that Andrew and James Caldwell evaded a settlement and payment of the debt due to Vance, Caldwell, and Vance.

The plaintiff's counsel urged, that Andrew and James acted *collusively*, and though they had a large sum of money in their hands due originally to Vance, Caldwell, and Vance, wished to evade the entire payment thereof, both to them and their creditors. The note to Fitzgerald was given to prevent attachments, and yet Andrew Caldwell, himself, takes out John Caldwell's attachment eleven months afterwards. This case may be compared to the practise in chancery on a bill of interpleader. There

a person not knowing to whom of right he ought to render a debt or duty, where two or more persons claim the same by different interests, prays that they may interplead, so that the Court may judge to whom it belongs, and he be thereby rendered safe in the payment. But the plaintiff in a bill of interpleader must annex an affidavit to his bill, that he does not exhibit it by fraud, or collusion with all or either of the defendants, or of any other persons, but only to be indemnified and to pay his debt safely to whom it belongs. 1 Harr. Cha. Pract. 265, 266. (7th edit. 114.) 1 Vez. 248. Such an affidavit would scarcely have been taken with safety by Andrew Caldwell.

It is admitted that the general rule is, that where one is disabled from paying money to a creditor, he shall not pay interest, and this holds between the garnishee and creditor where the attachment is properly levied; though the reasonableness of it may be disputed, where the money is not brought into Court within a reasonable time. Here the attaching creditor has failed in his suit; his attachment was ill grounded. The remedy of Andrew Caldwell should be by suit against the sheriff for laying the attachment improperly, or against the bail on the bond given to the sheriff. But the acts of John Caldwell, or the other plaintiffs in the attachment, ought not, on any principle, to affect Moore and Johnston. The property was attached as Vance, Caldwell, and Vance's, and not as Moore and Johnston's. There has been great delay and negligence in John Caldwell. He might have brought his writ of inquiry to March term, 1784, and his *scire facias* against the garnishees to the June term, following, and obtained a much earlier decision of the merits of this cause. But the object of Andrew Caldwell was delay, and as he originally instituted John Caldwell's attachment, it must necessarily be supposed that he acted no inconsiderable part in conducting it afterwards for his own purposes. He has trifled most egregiously with Fitzgerald, and every one else, who had pretensions to any part of the money in his hands. He stands in no degree of equity to be exonerated from the payment of interest.

Moreover, the attachments could not be pleaded in abatement. The authorities in the books vary; some say, attachments may be pleaded after condemnation; others, that they may be given in evidence. But if attachments are ill pleaded, or are avoided, garnishees, though they have paid the money, must pay it over again, and have no remedy, either in law or equity. 2. Show. 373, 374. And it is fully settled, that if attachments are ill pleaded, they are no defense for a debtor against the original creditor. 7 Vin. 235, pl. 3. Cites Bro. Dette, pl. 100, 22. H. 6, 47.

plaintiff in a foreign attichment has obtained judgment against the garnishee, and received the money, or execution has been executed, and the original creditor shall afterwards sue the garnishee for the debt, he may plead the condemnation in the foreign attachment, and this will be an effectual bar for the amount. Besides which the garnishee, by an act of assembly, will be entitled to his reasonable expenses.

This I conceive to be the rule in such cases.

It appears that the defendant in the present action has been summoned as a garnishee of Vance, Caldwell, and Vance, in three foreign attachments, and the plaintiff's counsel have agreed that he has pleaded them properly. There has been no replication, but they, or any of them, have been kept on foot by fraud; but the evidence to establish that fact is by consent, now submitted to the Court; and the question before us is, whether the defendant, under all the circumstances of the case, is liable to pay interest to the plaintiff, while the attachments were pending?

The general rule is agreed, that a garnishee is not to pay interest pending a foreign attachment. But it is contended that the defendant ought to do it in this case, for several reasons. 1st, That the first attachment was taken out by the defendant. 2dly, That the great delay was solely owing to him. And, 3dly, That a verdict has been given in this attachment, finding that the garnishee had no goods or effects of Vance, Caldwell, and Vance, in his hands; and, of course, that it was wrongful, and ought to have no more operation than if it had never existed.

There have been six foreign attachments brought, in each of which the defendant has been summoned as a garnishee, and no fraud or collusion has been alleged in the last five, one of which was brought by the real plaintiff in this action as early as the 30th October, 1783, and is still depending. The note on which the plaintiff was payable on the 8th April, preceding, so that there was but 6 months and 22 days interest then accrued, which is the whole time for which interest can be demanded from the defendant; because in Moore and Johnston's attachment there could be no collusion. With respect to John Caldwell's attachment, there does not appear sufficient evidence to ground an opinion that it was commenced by collusion. Fraud is not to be presumed, it must be proved. It is certain there was then a just debt of near 2000*l.* due to him, and the only thing which prevented his recovering in the attachment was, that the debt due from Andrew and James Caldwell to Vance, Caldwell, and Vance, had been, ten months before, assigned in equity to Moore and Johnston, according to the opinion of the jury. But at an

rate this circumstance was unknown to both John Caldwell, and Andrew Caldwell, and James Caldwell, at that time, and for years after, which put it out of their power even to suspect it. When it is considered, also, that John and James Caldwell were brothers, and that Richard Caldwell, of the house of Vance, Caldwell, and Vance, was another brother, it cannot be imputed to James Caldwell as a crime, that he wished to secure a just debt due from one brother to another; the contrary would seem rather unnatural. But it appears to me that James Caldwell had authority to commence this attachment for John, from letters he had theretofore received from him, and which have been read in Court. Be this as it may, no objections on the score of fraud have been raised against William Caldwell's attachment, which was taken out on the same day with that of John Caldwell.

Secondly. As to the *delay*, there is little ground for ascribing it to the defendant in this action. It was rather owing to the plaintiff himself, by first bringing his attachment and keeping it on foot, and by bringing a wrong action in the name of Hamilton, which depended till August, 1787, and was then discontinued; and lastly, by not speeding his present action. He and his counsel were probably doubtful in what way to prosecute his claim, so as best to serve him. It has indeed been an intricate affair.

Thirdly. As to the event of John Caldwell's attachment, it was impracticable for the defendant to foresee it. The plaintiff in this action has been so fortunate as to obtain a verdict for the defendant in John Caldwell's suit. But how could the defendant know that this would be the case, until it was determined? It was really a nice question. Let a foreign attachment be determined whatever way, the garnishee is excusable, by law, from paying interest in the meantime. The defendant in such attachment has his remedy against the plaintiff or the sheriff. The garnishee is brought into Court by compulsion, and should not suffer for doing what the law enjoins.

On the whole, I can discover nothing to make this case an exception to the general rule, and am therefore of opinion that the defendant is not liable to pay interest to Vance, Caldwell, and Vance, or their assignees, while the foreign attachments were depending, as they were brought for more money than the defendant owed.

Shippen, J. The same evidence often makes different impressions on different minds. I do not impute fraud to the defendant; but it appears to me that Andrew and James Caldwell have acted *officiously* in this business under all its circum-

stances; and I do not think that the steps they themselves have taken should exempt them from the payment of interest at least until the time of commencement of the attachment, 1785.

Yeates, J. The general principle I take to be as stated by the chief justice, that money *bona fide* attached, while in *graves legibus*, is not subject to the payment of interest. There may be possibly, however, exceptions to this rule, as between the garnishee and the defendant in the attachment, as when such garnishee gives no notice of the attachment for a considerable length of time to such defendant, and thereby prevents him from entering special bail, or defending the suit. (Vid. Hen. Blackst. 683.)

There is not sufficient evidence of fraud in the defendant, or his deceased partner, and the law will not presume it. The circumstance of the defendant interfering with respect to the attachment taken out by John Caldwell, weighs not greatly in my mind, when I consider the proofs and letters produced, and the relation which subsisted between his co-partner and the plaintiff in that attachment.

Moore and Johnston actually brought their attachment on the 30th October, 1783, and levied on this property as a debt due from Andrew and James Caldwell to Vance, Caldwell, and Vance, and at the same time they claim it by virtue of a secret equitable assignment. By this suit they affirm the property to be in Vance, Caldwell, and Vance, which they have disaffirmed on their defense on the trial of John Caldwell's attachment. While the different attachments were depending, and no one could foresee the event, it appears to me highly unreasonable to have expected that the garnishees should pay the money, without the fullest indemnification; and, therefore, I am of opinion that no interest is demandable of them pending the attachment.

Bradford, J., declined giving any opinion, as he was formerly concerned as counsel in the cause.

NOTE.—A writ of error was taken out hereupon, returnable to the High Court of Errors and Appeals, where it appeared, by a written memorandum signed by counsel, that it was agreed that "the judgment entered for the sum found by the referees should be absolute, but await the trial of the attachments, and that if anything should be recovered thereon against the said Andrew Caldwell, the same should be defalked out of the said sum for which judgment was rendered as aforesaid, and execution issue for the residue only."

This agreement did not come before the Supreme Court during the preceding argument, nor was it mentioned by any of the counsel.

The Court of Errors and Appeals, on the 18th July, 1793, ruled, that the parties were bound by the express terms of that agreement, and that the Supreme Court could effect no alteration in the judgment which was to be entered *provisionally* thereon. Their decree was as follows:—

That the last judgment or decretal order of the Supreme Court, “that Andrew Caldwell shall be discharged from the said judgment, on the payment of 4016*l.* 9*s.* 4*d.*; to-wit: the principal sum found due to Vance, Caldwell, and Vance, by the second report of the referees, and all costs of suit,” be reversed.

That the judgment of the Supreme Court rendered in the term of January, 1791, in favor of George Fitzgerald, the plaintiff in error, for 5009*l.* 5*s.* 1*d.* with the costs of suit, and by the agreement of the parties stated in the record made absolute in January term, 1792, be and the same is hereby (according to the terms of the said agreement) affirmed and made stable.

And that the records and proceedings in this cause, and all things concerning the same, be remitted into the Supreme Court, that such further proceedings may be had thereon, as well for execution as otherwise, as to justice shall appertain; each party to pay their own costs on the writ of error. [See *Siekman vs. Lapsley*, 13 S. R. 226.]

MEMORANDUM.—The Supreme Court opened in Philadelphia on the first day of September term, 1793, but adjourned to the last day of the term, by reason of a malignant fever, which then greatly raged, and carried off a great number of the citizens. No other business was done except receiving sheriff's returns, and entering of motions made by the different counsel.

AT NISI PRIUS, AT HUNTINGDON,

MAY ASSIZES, 1793.

CORAM M'KEAN, CHIEF JUSTICE, AND YEATES.

LESSEE OF WILLIAMINA BOND *vs.* THOMAS HUNTER AND WILLIAM HUNTER.

A cause shall not be postponed for the non-attendance of a witness whose deposition has been taken, where the adverse party agrees it shall be read in evidence.

MR. HAMILTON, for the defendants, moved to put off the trial of this cause, on affidavit of the service of a subpoena on Thomas Ferguson, a material witness for the defendants, and his non-attendance.

This was opposed by Mr. Charles Smith, for the plaintiff, who urged that the deposition of Ferguson had been taken by the defendants in pursuance of a rule of Court, and he agreed the deposition of the witness might be read in evidence.

Per Curiam. The sole reason of taking depositions is to supply the non-attendance of witnesses; and when the depositions of absent witnesses have been taken and are agreed to be received as testimony, their non-attendance cannot be a ground for postponing the trial.

The trial of the suit was afterwards put off for the want of another witness, whose deposition had not been taken.

LESSEE OF JOHN MAXWELL NESBIT *vs.* PETER TITUS AND JAMES KARR, TENANTS; JAMES RANKIN, LANDLORD.

Evidence shall not be received of the declarations of the secretary of the land office at the time of issuing a warrant; or of the claim of the party to certain lands; or of his intentions in taking out the warrant.

But applications to the deputy surveyor to make a survey, and what passed thereon, are good evidence.

On the trial of this cause, Alexander Lowrey was sworn as a witness on the part of the defendants, who had taken out the warrant under which James Rankin, the landlord, claimed. It was contended that he should be permitted to give in evidence the parol declarations of the secretary of the land office, at the time of issuing of the warrant, the claim of Rankin to the

lands in question, and his intentions in taking out the warrant ; and also the applications of the witness, as agent of Rankin, to Richard Tea, the deputy surveyor of the district, to cause the lands to be surveyed, and what passed thereupon.

By the Court. It would be of the most mischievous consequence to the community to allow the two first species of evidence to be given ; nor under such a practise could any one be safe in his title to lands. It would introduce every evil which the act of assembly respecting frauds and perjuries was intended to prevent. The warrant must be judged of as it appears on the face of it, and whether it is sufficiently descriptive of, or locates precisely the lands in question, can only be determined by testimony ascertaining the local situation of the lands, and the natural or artificial boundaries or marks contained therein. The intention of the party is of no moment, unless it is reduced to writing in the warrant ; nor can the declarations of the secretary of the land office have any legal operation. If any particular agreement was made, or special indulgences intended by him in behalf of the applicant, they should have been committed to writing, or inserted in the warrant, or in the written directions to the deputy surveyor to make the survey, that they might be open to the view of every one who might be desirous of investigating the title.

As to the applications by the witness to the deputy surveyor to make the survey, and what passed thereon, it is proper evidence ; because it is an act done in prosecution of the title, and tends to show that no laches or neglect is imputable to the party who took out the warrant, but that he made the proper efforts to complete his title. Such evidence has constantly been received. Were it otherwise, it would scarcely ever be possible to shew fraud or improper conduct on the part of the deputy surveyors. In contests like the present, it is of great moment to establish that the party's pretensions have been duly followed up without negligence ; that he has not lain idly by while surveys have been made on the lands for other persons ; and that when a survey adverse to his claims has been made, he has filed his *caveat* in a reasonable time for bringing the matter to a hearing before the Board of Property.

Messrs. Duncan and C. Smith, *pro quer.*

Messrs. Hamilton and Riddle, *pro def.*

It did not appear in evidence that the lessor of the plaintiff, after the conveyance made to him by Byers, took any steps whatever to obtain a survey, or file a *caveat* against the survey of Ross, or use any diligence in following up his pretensions to the land, until he obtained the judgment of the board of property, in 1783; but how the controversy originated before them was not shown, or whether any person was notified, or did appear in support of the claim, late of Alexander Ross.

But it was proved by several witnesses that the said James M'Kee first seated himself on the land, and began to build a cabin, about Christmas, 1768, which was finished in 1769, after the office opened, and originally held it by what he *falsely* called an *improvement*, which he had continued by himself or his tenants up to the present period, and that at the time of commencing the ejectment he had a good house, barn, stables, some meadow ground, and above 60 acres of land cleared on the farm; that his father had sent to Philadelphia applications for several tracts of land for his sons, and, amongst others, one for the tract in question, to be entered in the office, which had miscarried, but that, under an impression that the locations had been sent by mistake to a wrong surveyor, the survey had been actually made for the said James M'Kee, his son, and John M'Kee, his brother, had paid 5*l.* for the surveying fees.

It was also proved by Michael Huffnagle, esq., one of the agents of forfeited estates, that the premises had been advertised for sale by order of the Supreme Executive Council, and were publicly sold at Pittsburg by outcry, on the 12th March, 1784 (no one setting up or pretending any adverse claim or title), to the said James M'Kee, for 35*l.*, who paid him the consideration money at that time; that he had made return thereof within five or six months afterwards to the council, and that in December, 1785, he paid the money into the treasury, and the lessor of the plaintiff meeting him in Philadelphia, first acquainted him of his having a title and patent for the lands, and desired him not to proceed on the sale; to which he answered that, having sold and paid the money into the treasury, he was bound to go on in the discharge of his duty; that he informed the council of what had passed between himself and Blaine, but, on consideration, they awarded a patent to issue to M'Kee.

It was likewise shown that the location of Ross was more precisely descriptive of the lands in question than that of Byers, the former being better adapted to the swell of the bottom land in the bend of the river Monongahelah. To obviate the objection that Blaine did not give notice of his title to the lands at the sale made by the agents, it was proved that he had pro-

ceeded from Pittsburg to Kentucky on the 21st November, 1783, and did not return from thence until the month of June, following.

The cause was argued by Messrs. J. Ross and Brackenridge, for the plaintiff, and Messrs. Woods and Galbraith, for the defendants.

Yeates, J.,* in summing up the evidence to the jury, observed, that it was incumbent on the plaintiff to make out a good title before he could recover the lands in question, and that the real gist of the controversy lay in a proper comparison of the rights of Blaine and Ross, previous to either of the patents being issued. He premised, that—

Applications in the land office, after the opening of it on the 3d April, 1769, are the inceptions of titles when duly pursued. Merely of itself, such a location creates no right. No part of the purchase money is paid. It is the bare expression of a wish to hold certain lands, on which 7s. 6d. only is paid for the office fees of entering it. No title vests thereby, nor does it form any contract, on which the party could be sued by the proprietaries formerly, or by the state now, until a survey has been made, designating the party's pretensions by metes and bounds. When such a location is followed up with proper diligence, it will give a right of pre-emption to the lands described therein; but any location may, like the *imperfect title of improvement* (Vide act passed 5th April, 1782, § 2) be forfeited by abandonment or dereliction. When there has been negligence in obtaining a survey, a subsequent location may, by due industry, defeat its operation as to lands which it might be supposed to describe with sufficient accuracy and certainty.

If these general rules are correct, as it is presumed they are, the application of them to the case before us is familiar and easy. The plaintiff's location does not precisely describe these lands. It calls for the land in the bend of the river. That of the defendant's is more close and descriptive. The plaintiff has been guilty of gross laches and neglect in laying by for fourteen years without getting a survey made, or making any pretensions to the lands, during which period they have been rendered much more valuable by the labors of the occupier. Ross gets a survey returned, which appears, however, to have been made in 1769, for James M'Kee, and paid for by his agent. If the plaintiff has suffered a survey to be made, though he might originally have

* M'Kean, C. J., attended the trial in the forenoon, but was confined, by indisposition, to his chamber, after the adjournment of the Court.

included the lands in question, and not entered his *caveat* in due time, or made his objections thereto, he shall be postponed. Such is the practise of all Courts and juries, and of the land office, and ought to be so on general principles of convenience to the community. For no one should be permitted, under a general though early application, to *thumb* the face of the whole country, and retard its settlement and cultivation by his own negligence.

The question, then, if determined on the relative merits of the titles of Blaine and Ross, immediately before the latter joined the common enemy, will admit of an easy solution. The maxim, "*vigilantibus non dormientibus leges subserviunt*," applies with peculiar force in the case of rights founded on location. I throw out of view the permission of Captain Edmonstone, as it does not appear that a settlement attended it, but an adverse possession has been shown in evidence.

The judgment of the Board of Property cannot alter the nature of the title. What grounds they proceeded on, we know not. But this we know, that the parties interested have a legal right to contest their decision in a Court of law, by the express words of the act of assembly of 5th April, 1782. No *caveat* or judgment of the Board of Property is produced on the part of the plaintiff. It does not appear that any notice previous to the hearing was given to the attorney general, the agents of forfeited estates, or to any executive officer whatever. We must therefore conclude it to be *ex parte*; nor can I bring myself to believe, if the Board of Property knew as much of the case as we are now possessed of, they would have given such a judgment. Be this as it may, we must now form a judgment for ourselves, on the whole of the facts given to us in evidence.

By the attainder of Alexander Ross, for high treason, his whole estate, real and personal, became vested in the commonwealth, under the 5th section of the act of assembly of 6th March, 1778, And under this law, and the supplement thereto, passed 29th March, 1779, the agents of forfeited estates were directed to sell the estates of traitors in a certain mode prescribed. The same laws which vested the property in the state qualified the sale of it by the instrumentality of certain persons authorized for that peculiar purpose. And such a restriction was highly necessary for the general benefit. Otherwise, highly improved lands, lying perhaps in the vicinity of the metropolis, or in the heart of the state, forfeited by the attainder of persons who had joined the enemy, might be disposed of on the common terms of vacant and unappropriated lands; which never could have

been the will of the people. These acts are certainly more than *directory* ; they are *restrictive*.

It appears to me, therefore, that it is an insuperable bar to the plaintiff's recovery, that he does not deduce his title through the proper and legal conduit of sale and conveyance, supposing the adverse legal title of Ross to be preferable. The agents of forfeited estates sold these lands on the 12th March, 1784, and then received the money of the purchaser. It is not possible to conceive that the commonwealth, above nine months afterwards, could convey a legal right to the lessor of the plaintiff, after they had parted with their title, through the medium of the agents of forfeited estates. They could not grant what they had not; and neither the state nor an individual can do an act and produce an effect morally impossible in itself.

My opinion, on the whole, is decidedly with the defendants; and I have the satisfaction of declaring that the chief justice concurs with me in opinion.

The plaintiff suffered a nonsuit, without permitting the jury to leave the bar.

AT NISI PRIUS, AT GREENSBURGH,

MAY ASSIZES, 1793.

Coram YEATES, JUSTICE.*

RICHARD SMITH, lessee of JOSEPH SIMON, *vs.* JAMES GIBSON and THOMAS GRIER.

No one shall be permitted to overturn his own deed by subsequent expressions. A deed between father and son, a minor, though fraudulent as to creditors, is yet binding as between the parties.

A purchaser, with notice of a previous agreement between the grantor and another, takes the land subject to the agreement.

It was admitted by the parties, that on the 18th August, 1783, Michael Gratz was seized in fee of the premises in question (a house and lot of ground in Pittsburg), and on the 5th March, 1784, entered into an agreement with John Gibson, father of James Gibson, one of the defendants, to re-convey to him the premises, which had been formerly sold by the sheriff for his debts, on his payment of the moneys which he had advanced for the purchase; that Gratz afterwards, on the 4th September, 1787, by deed conveyed the premises to the lessor of the plaintiff, who had been informed of the previous agreement between him

* M'Kean, C. J., was confined with a fever during the sitting of the Court for Westmoreland county.

the jury, that the plaintiff must recover by his own strength, and not by the weakness of his adversaries. The plaintiff claims under a location, whereon no survey has been made. Paul, the agent of Irwin, applied between 1774 and 1776, for a survey to be made of the lands held by Nicholls, but on being informed that the location better suited other lands, he freely relinquished the making of it, and said he would write to his brother-in-law, who should determine for himself. No further steps appear to be taken by either of them. A location independent of due diligence being used to obtain a survey, or to prosecute the claim of the party, gives no legal or equitable right to the pre-emption of lands. It is of itself no title. Like the fancied land jobbing improvements of girdling a few trees, or picking some brash heaps, such applications give no equity; and when deserted and abandoned, like them, they afford not a shadow of a right. The party, by his negligence and laches, forfeits all his pretensions to a claim, which if duly pursued, would be the inception of a title. But there is a legal bar to the plaintiff's recovery. The ejectment was brought after the 2d March, 1785. Under the 5th section of the act of assembly of that date, it is provided, that "no persons having any claim to the possession of lands, or the pre-emption thereof from the commonwealth, founded on any *prior warrant*, whereon *no survey* has been made, or in consequence of any prior settlement, improvement, or occupation, without other title, shall hereafter enter, or bring any action for the recovery thereof, unless they or their ancestors, or predecessors, have had the quiet and peaceable possession of the same within seven years, next before such entry or bringing such action." Now it is evident to me, that the words "prior warrant" include also "a prior application or location." *Omne majus continet in se minus*. The words of the act expressly mentioning *warrants*, though money may have been paid thereon, must *a multo fortiori*, be construed to extend to *unexecuted locations*, which are but the bare expressions of wishes to hold lands. The act is an excellent safeguard to landed possessions, and highly beneficial to the community, and should be construed liberally. Indeed, when there has been *fraud* in the surveyor to whom the location is directed, or where the adversary has *forcibly* and *violently* prevented the making of the survey, the prohibitory terms of the law may not apply, unless there has been a *bona fide* conveyance to a purchaser without notice. But in the present case there is no evidence of fraud, force or threats, to prevent a survey being made; and therefore, if my idea of the law is just, the plaintiff is not entitled to recover in this ejectment.

Plaintiff nonsuit.

Lessee of WILLIAM TODD *vs.* PHILIP OCKERMAN and DANIEL ST. CLAIR.

A settler under a military permit does not lose his preference by omitting to file an application in the land office on the 3d April, 1769

A grantor of lands allowed as a witness under a release, though the date of the deed was not specified therein.

Certificate of surveyor general, that he had issued a special order to a deputy surveyor to survey lands, allowed to be read in evidence, under special circumstances.

EJECTMENT for one message and 300 acres of land in Mount Pleasant township.

The title of the lessor of the plaintiff rested on an application entered in the land office on the 3d April, 1769, No. 60, in the name of Simon Eaker, for 300 acres of land joining the Chestnut ridge and the Shelving rocks, or otherwise called Pine or Spruce rocks, on the south-west side of Loyalhanna, a survey thereon of 279 acres, 100 perches, and allowance, by Robert M'Crea, deputy surveyor, of the 17th October, 1769, returned in dispute; and divers mesne conveyances, vesting the location and survey in Todd.

The defendants gave in evidence an application entered on the 7th April, 1769, No. 2969, by John Grant, for 300 acres, on the Nine Mile Run beyond Fort Ligonier, joining lands of Arthur St. Clair, who, by deed poll dated 10th April, 1776, convey the same to the said Arthur St. Clair; another application, entered on the 23d June, 1769, No. 3543, by the said Arthur, for 300 acres on Loyalhanna and the Nine Mile Run to the west of the Chestnut ridge, including improvements made by permission of Colonel Reid, when commanding officer at Fort Pitt; a survey of 609 $\frac{1}{4}$ acres and allowance on both applications, by John Boyd, deputy surveyor under William Thompson, the easternmost tract surveyed on a *special order*, in the name of Arthur St. Clair and an application, and the westernmost in the name of John Grant, made on the 15th June, 1772; an order of the Board of Property on a *caveat* filed by the said Arthur against the survey made for the said Simon Eaker, directing a patent to issue to the said Arthur on the 3d March, 1788; a deed from the said Arthur to his son Daniel for three tracts of land, including that in question, dated 7th July, 1788; and a patent to the said Daniel St. Clair, in consideration of 82*l.* 4*s.* for the said 609 $\frac{1}{4}$ acres.

To prove the permission of Colonel Reid, who commanded to the westward, and which was said to be lost, Governor Arthur St. Clair was produced as a witness, together with a release from the said Daniel, his son, of all covenants of quiet enjoyment, &c., or warranty, either express or implied, contained in his deed. This release was objected to, because blanks were left in

the description of the date of the deed, as to the day, month, and year; but the objection was overruled, the deed being sufficiently referred to by a general description of the lands therein.

Governor St. Clair, being sworn, proved that he obtained a permission from Colonel Reid in 1766, or 1767, to make a settlement on the road to Pittsburg, at the Nine Mile Run from Ligonier, and at Dagworthy's Breastworks, and to occupy the land between the road and Loyalhanna; that in 1776, he sent this permission, with other valuable papers, from Philadelphia to Carlisle in a trunk, which miscarried by the way, and, notwithstanding all his efforts, he had never been able to retrieve it; that in 1767, or 1768, he took possession of these lands, and surveyed and marked all the lines thereof (which have been since exactly returned in the survey on both applications), except by the Loyalhanna creek, which possession had continued by himself and his son, and their tenants, to the time of commencing this ejectment, with considerable improvements, except that about six years ago one Patrick Graham privately possessed himself of part of the lands in question, and, sometime after, ran away. That believing his title under the permission to be good, he did not make an early application to the land office. When the witness saw M'Crea at Ligonier, in the fall of 1769, he showed him Colonel Reid's permission, and requested him to make the survey, but he declined it by reason of Eaker's earlier location, promising, however, that he would not make an adverse survey. Understanding, however, afterwards, that M'Crea had made a survey in breach of his engagement, for Eaker, the witness complained to Governor Penn respecting him in 1770, who thought proper to direct the surveyor general to issue a *special order* to William Thompson to make the survey. This special order he afterwards saw in Thompson's hands; and at two different subsequent periods, previous to 1788, he applied to John Lukens, esq., the late surveyor general, for a copy of the special order, but on the most careful search, it could not be found. When the hearing was had before the Board of Property, Mr. Lukens being indisposed with the gout, could not attend, but gave a certificate, of which the paper produced is an office copy.

This paper was a certificate of the surveyor general, dated 3d March, 1788, that "he had issued an order to William Thompson to survey these lands for Arthur St. Clair," and was offered in evidence, but was objected to on the following grounds: Because, First, there was negligence in not searching the surveyor general's office since 1788. Secondly, there was no certificate from the office that the paper was not to be found there. Thirdly, the defendant's return of survey specifies no such

special order. Fourthly, it is the certificate of a fact. Fifthly, it is not upon oath. And lastly, the 3d section of the act of assembly of the 9th April, 1781, directs that copies of entries, records, and papers of the offices, duly attested by the respective officers, shall be as good evidence as the originals, by law, might or could be, but the original hereof could not be legal evidence. After full argument of these objections by counsel,

Yeates, J. gave his opinion thereon, but previous thereto, it was proved that the special order could not be found amongst Thompson's papers. It is now fully settled, that the rule requiring the best evidence to be produced that the nature of the fact is capable of, is restrained to mean, that no such evidence shall be admitted, which *ex natura rei* supposes still greater evidence behind in the party's own power, because of the presumption that such evidence is against him, or he would produce it. (Gillb. Law. Evid. 16; Bull. 289.) Here proof has been made, that due and reasonable diligence has been used to procure the original special order, both in the surveyor general's office and also amongst William Thompson's papers, and it could not be found. It is said, this proof should be had by a certificate from the surveyor general's office, and not by a stranger. But such certificates will not always be given, least the paper inquired for might be overlooked on the most careful search. The oath of the party is tantamount, and is attended with this advantage, that the Court is enabled to judge from his examination, whether proper pains have been bestowed in the search. It must be remembered, that the proprietaries kept the land office in their own way, and did their business as they thought proper. When the assembly wanted to make it an office of record, during Denny's administration, and the governor passed the law, interest was found in England to procure the royal dissent thereto. The proprietaries were jealous of any one interfering respecting their land office, and considered it as subject to their mere control. Matters of consequence were frequently transacted by loose notes between the secretary and surveyor general, of which scarce any traces are now to be found. The defendant's return does specify that the easternmost tract was surveyed on a "special order and an application;" but whether these words refer to the peculiar description of the location, No. 3543, calling for the improvements made under the permission of Colonel Reid, or the immediate particular direction of the surveyor general, by order of the governor, to Thompson, must be submitted to the jury. It seems reasonable, that the same evidence which would satisfy the board of property of the special order of Thompson to sur-

vey, should be received here. We sit to revise what they have done. Both Lukens and Thompson are dead, and cannot be produced. The former gave this certificate officially, and was then a sworn officer. What other testimony of the authority of Thomson can the defendants have in their power to produce, under all the circumstances of this case? The paper offered in evidence is, in fact established by the decision of the board of property and the patent; both these instruments recognize the power of Thompson to make the survey, and I can see no reasonable or legal objection against the reading of the certificate in evidence; but at the same time, as the point has been much insisted on, I shall leave it as a question reserved for the opinion of the Court in bank, in case the plaintiff shall think proper eventually to bring it before them.

The certificate was then read in evidence.

Another question was made before the Court.

It was insisted on the part of the plaintiff, that Arthur St. Clair, not having entered his application on the 3d April 1769, when the office opened for the lands in the new purchase at fort Stanwix, thereby lost the preference which he otherwise would have had under the permission of Colonel Reid; and in the proof thereof, the opinions of the judges of this Court in the case of Graham's Lessee *vs.* Wilson, and Thompson's Lessee *vs.* Weitzel, both tried in this county, were cited, wherein it was said that doctrine was sustained.

E contra, for the defendants, it was contended, that in the case of the lessee of Croghan's executors *vs.* Elliot, tried here in 1790, it was expressly ruled, that one having a permission from the commanding officer to the westward, was not bound to enter his location on the 3d April 1769, being protected by his license to settle, and the governor's proclamation of 1768.

Yeates, J. I regret that this matter comes before me *singly* for decision, and more peculiarly so, because until the present circuit, my mind has not been occupied by titles of this nature. Whenever there has been a settled, fixed rule of decision, I shall not think myself warranted in infringing it, whatever my private ideas may be on the subject; for endless uncertainty and confusion would thus necessarily ensue. But it seems here admitted by the counsel, that this point has been ruled differently, and therefore it is in some degree left open for further discussion.

The act of assembly of 3d February, 1768, contains an express provision in favor of those "who then were, or thereafter might be settled on the main roads or communications leading

through this province to Fort Pitt, under the approbation and permission of the chief officer commanding in the western district, to the Ohio, for the time being, for the more convenient accommodation of the soldiery and others." The proclamation of governor John Penn, of the 24th February, following, recites this law with the same exception. While all others, therefore, were subjected to the penalties of death, for neglecting and refusing to remove from the lands then unpurchased from the Indians, such settlers, with permissions, were protected in their possessions, and tacitly encouraged to go on with their improvements. The preamble to the opening of the land office on the 3d April, 1769, holds out the same ideas, and expressly declares that "those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward, were declared to have a preference, but those persons who had settled or made what they call improvements since that purchase, should not thereby acquire any advantage." It appears to me, that the settlements without permits entitled to a preference under these words, must necessarily be restricted to those *bona fide* improvements which were made prior to 3d February, 1768 (the time of passing the law), and who removed therefrom on the governor's proclamation. There are no words which expressly direct that settlers, with permissions, shall forfeit their preferences, by not making applications on the day of opening the office. Their rights are secured by an independent clause. Nor, in my idea, would any other construction be reasonable or just, or agreeable to the usage and practise of the proprietary land office, as to improvements in the old purchase, or the liberality with which they were accustomed to treat original settlers on vacant lands. These people, under a kind of license, granted to them as the followers of a camp, or necessary concomitants of an army defending the western territory, had settled and cultivated farms, at some considerable expense and risk, and received encouragement from the lords of the soil. The strictest rules of justice and fair dealing would demand that they should have due and convenient notice of a different arrangement, before they should be required to abandon the product of their labors. Suppose a person possessed of a crop of corn in the ground, having a permission to settle, and does not enter his application on the 3d April, 1769, shall another, who enters his location and gets the same early surveyed before the ensuing harvest, strip him of this property, by an action of mesne profits subsequent to the trial of his ejectment? Every man's feelings will answer in the negative, and will assert that such settlers were sheltered and

AT NISI PRIUS, AT LANCASTER,
SEPTEMBER ASSIZES, 1793.

Goram M'KEAN, CHIEF JUSTICE, AND YEATES.

GEORGE HOOFNAGLE *vs.* HENRY DERING.

A commission to two to examine witnesses cannot be executed by one, without notice to the commissioner of the other party.

In this cause a commission had issued to William M'Cleary and John Williams, of Morgantown, in the state of Virginia, esqrs., to take the examination of a witness on the part of the defendant, dated 13th April, 1793. The commission was executed by William M'Cleary only, on the 17th May, 1793, and exception was taken to reading the answer of the witness, because both commissioners had not joined.

Per Curiam. The authority to the two commissioners is joint; and it certainly could not be executed by the commissioner on the part of the defendant, without notice to the plaintiff's commissioner. In this instance, too, the defendant has taken out a new commission for the re-examination of the same witness, which strongly implies that the former execution of it was irregular; and, therefore, the reading of it in evidence must be overruled.

Messrs. Ingersol and C. Smith, *pro quer.*

Messrs. Kittera and M. Barton, *pro def.*

Lessee of JOSEPH PEELET *vs.* GEORGE HESS.

Where plaintiff has issued his *distringas*, and given notice of trial, the defendant is not bound under his *distringas* by proviso, to give notice of trial.

THE plaintiff had issued a *distringas* and given notice of trial; the defendant had issued a *distringas* by proviso, but gave no notice; and the plaintiff objected to the defendant bringing on the cause.

Per Curiam. This point has been frequently determined under the forty-seventh rule for regulating the practise of this Court.

The rule was made to prevent surprise; but surprise cannot be pretended by the party who has himself given written notice of trial.

The plaintiff then made affidavit of the absence of a material witness duly subpoenaed, whereupon the cause was postponed.

Messrs. Montgomery and Hopkins, *pro quer.*

Messrs. Kittera and C. Smith, *pro def.*

JOSEPH FERKE *vs.* DAVID STROME and HENRY STROME.

A witness may, by his own act, dispense with the legal forms of serving a subpoena, and will be under contempt for non-attendance.

THE defendants moved to put off the cause on account of the absence of material witnesses, and, among others, of John Breckbill, who was said to have gone to Wilmington, in the state of Delaware, and was soon expected to return. Affidavit was made of the service of the subpoena, and of his being a material witness, whereupon the cause was postponed until the next day, and an attachment awarded returnable forthwith. The sheriff could not take him on the attachment; but information being given two days afterwards that he was returned home, and the witnesses on both sides having been kept in town, another officer was dispatched for Breckbill, and he was brought in the next morning. He denied the service of the subpoena on himself personally, and it appeared on the examination of the person who was said to have served it, that he had shown him a subpoena, and required his attendance. Breckbill, on looking at it, said his name was not in the writ, to which the other replied, that then it certainly was in the other subpoena which he had in his pocket, and was about pulling it out when Breckbill evaded it, and said he would endeavor to attend. The Court, on the whole, thought it amounted to a service; the witness, by his own act, having dispensed with the legal forms, and ordered him to pay the costs of the attachment and service. He was reprimanded for his conduct, but, as he asserted that he did not conceive himself to be subpoenaed, he was dismissed without any fine.

Messrs. Montgomery, C. Smith, and M'Kean, *pro quer.*

Messrs. Ingersol and Kittera, *pro def.*

himself interested, though under a mistake, is no witness. 1 *Str.* 129.

It was argued for the defendants, that by the death of her husband, pending the suit, the witness ceased to be interested. She is no party to the suit, nor in any shape liable for costs. She must be considered, in sound sense, as an inmate of her son, though living in a separate dwelling. The old exceptions against witnesses are greatly narrowed by the modern decisions, and are now restrained to immediate interest, and where the verdict can be given in evidence by the witness in another suit. 3 *Term Rep.* 27, 32, 34, 36, 309, 310. 4 *Burr.* 2251. 4 *Term Rep.* 20. And neither of these grounds will hold in the present instance.

By the Court. Perhaps the widow would be a competent witness in a common case. But the true objection against her testimony appears to us to be the subject matter of it. On principles of general convenience, it would be highly dangerous to admit evidence of this kind to impeach the titles of vendees under sheriff's sales. If declarations of the debtor, that he had sold the lands to another, could be brought forward in this way to overreach a judgment against him, no one would ever purchase at a sheriff's sale, and every creditor would be at the justice, if not mercy, of his debtor. If there has been a *bona fide* sale by Martin Miller, previous to the judgment, let it be shown by the written agreement or conveyance. Should they have been lost, prove them by copies, or give their contents to the jury by parol evidence. No inconveniences can result from this better mode of proof; but it is of the utmost importance to the community, that in disputes like the present, which unfortunately have become too frequent, that the rules of law should be rigidly adhered to; and therefore we feel ourselves constrained to overrule the deposition.

The lands in question having been bought at a very inadequate price, 6*l.* 15*s.* (owing to an idea which prevailed at the sheriff's sale, that they belonged to the family of Digges, under a Maryland patent), though they were proved to be really worth between 7*l.* and 8*l.* per acre, the cause was accommodated by the recommendation of the Court; and the counsel agreed, that a verdict should be given for the plaintiff for sixty-nine acres, with stay of execution until the 25th March, next, and until the sum of 120*l.* should be paid by the lessor of the plaintiff to the defendants.

Messrs. Ingersol, Hamilton, and Bowie, *pro quer.*

Messrs. Hartley, Duncan, and C. Smith, *pro def.*

Lessee of FREDERICK EICHELBERGER and JACOB GARTNER *vs.* JACOB BARNITZ, ADAM KREEBER, and GEORGE BOTT.

An agreement shall not be set aside because the vendee did not inform the vendor of circumstances which the vendor himself was bound to know.

When two or more executors sell lands openly and fairly, and they have been bought in by a stranger for one of them, such a sale is not void necessarily. It is not merely of itself a *fraud* to vacate the contract, but matter of evidence to be judged of.

EJECTMENT for forty-four acres of land in Manchester township. Reinhard Bott, being seized of the lands in question, made his will dated April 19, 1790, whereby he empowered his executors, Jacob Barnitz and Adam Kreeber, two of the defendants, to sell his real estate adjoining Yorktown, at their discretion. The original patent granted by the late proprietaries to Herman Bott, who conveyed to the testator, was for 279 acres, by metes and bounds, of which 86 acres were sold and conveyed to divers persons, 5 acres were reserved to Barbara Bott, and $4\frac{1}{2}$ acres were devised to the widow, with the mansion house and barn. The executors apprehending that the remainder of the tract contained only $183\frac{1}{2}$ acres, advertised it for sale as 180 or 182 acres, and afterwards by other advertisements described it as containing 170 and odd acres, deducting the ground occupied by two roads running through the tract.

The place was put up to sale by public vendue on the 13th July, 1790, and the conditions of sale expressed it to contain 170 acres, more or less, when it rested at the bid of Barnitz for 1810*l.* for the benefit of the estate of the testator. The sale was then adjourned and resumed again in the month of October, following, and also at a subsequent period in the ensuing month, but after the utmost pains taken, no additional bid was given. The executors then entered into private treaty with the lessors of the plaintiff on the 12th November, 1790, for the sale of the lands, and agreed to convey the same to them for 1825*l.* whereof 500*l.* was to be paid on the 1st March then next, following, and 120*l.* per annum until the whole should be paid. Barnitz drew up a small memorandum of the agreement, which was signed by all the parties, describing it shortly to be the plantation whereon Reinhard Bott lately lived, without expressing any quantity of acres, but with a reservation of 5 acres to Barbara Bott and $4\frac{1}{2}$ acres to the widow of the testator. A more formal agreement was executed by the parties on the 15th November, following, drawn by the scrivener from the original memorandum delivered to him, describing it as the place whereon Reinhard Bott lately lived, and the names of the adjoining neighbors (which boundaries, it was admitted, would comprehend the 44 acres in dispute) containing 170 acres, be the same more or less, excepting $4\frac{1}{2}$ acres to the widow, and 5 acres on the Carlisle road, reserved for the use of Barbara Bott, for the con-

tract. Prec. Cha. 575. If a misconception arises, without any actual misrepresentation or deceit, and the sale of an estate by auction is hurt by the act of an agent for the vendor, in conjunction with the vendee, equity will not carry the agreement into execution. 2 Pow. on Cont. 225. 2 Bro. Cha. Ca. 326.

The purchasers at the vendue expected to buy 170 acres only, or they certainly would have given an advanced price. The lessors of the plaintiff knew the fact of the surplus land, and have declared they would not have purchased unless they had fully understood so. They lay under a moral duty to have disclosed that knowledge, and not having done so, could not expect in equity, a decree for a specific performance. Suppose a person offers a bale of cloth for sale, believing it to hold 100 yards, and asks 100% for it under that impression, and a purchaser from his superior knowledge of the article, is ascertained of its holding out 120 yards, and bargains for the same: shall he hold the vendor to the contract? An agreement made by mistake is not binding, if the point misconceived was the cause of the agreement. 2 Pow. on Cont. 196, 197, cites Mosely, 364. 1 Vez. 400. Specific performance not decreed where there is a concealment on the part of the vendor. 1 Bro. Cha. Ca. 440. A wilful and industrious concealment of a material fact by one of the parties, in order to keep the other in ignorance, and to profit by that ignorance, is a gross fraud, and will in equity set aside the contract. 4 Bro. Parl. Cas. 497.

But the sale was void in law. Kreeber, the executor was both seller and buyer. Cowp. 395. The written agreement of the lessors of the plaintiff and Kreeber declares that the lands were bought for the use of the company of five. All bargains by trustees, made in behalf of themselves, and tending to eat up the trust property, are discouraged in equity. 2 Pow. on Cont. 195. Cites 3 Wms. 251, in note. No trustee or person acting under him shall be a purchaser in equity, on account of the great inlets to fraud. 2 Equ. Ca. Ab. 740, pl. 5; 741, pl. 7. Cites Sel. Ca. in Cha. 13, 61. Trustee not allowed to purchase by the instrumentality of another, at a public vendue. It is not enough for the trustee to say, there is no fraud proved, as it is in his own power to conceal it. 1 Vez. 9.

On the part of the plaintiff it was argued, that if the executors, or one of them, lay under a mistake, it was their own fault not to have sufficiently informed themselves in this particular. The means of information were natural and easy, and in their own power, and they shall not now avail themselves of a supposed mistake. It was their business and duty to search out the truth-

2 Pow. on Cont. 264. 2 Atky. 591. The description in the memorandum drawn by Barnitz, and also in the articles of agreement, evidently include the whole lands; and the transactions which immediately preceded the execution of the articles, plainly show that the whole of the lands was in the contemplation of the sellers as well as buyers. The objection then against the plaintiff's recovery on this ground, must fail. To call the negligence of the executors a mistake, is too soft a term. If they had reflected for a moment, they must have known that almost all old surveys contain large measure, and should have calculated accordingly, or have got a new survey to be made.

In the case put by the defendant's counsel, we have no scruple in saying that the contract would not be rescinded either in law or equity. The course of transacting business at large, will have due weight in matters of this nature; and Courts of justice will be cautious of impeaching contracts under the idea of a refined and over-strained morality, which seldom or never takes place in the ordinary affairs of life.

The second objection to the sale has been picked up at the bar. It never occurred to Barnitz when he wrote his letter in April, 1791. As to the principle that a vendor cannot bid at the sale of his own goods, we will only observe in general, with Sir Lloyd Kenyon, when master of the rolls, that we do not say the doctrine in *Bexwell vs. Christie* (Cowp. 395), is wrong; but every body knows that bidders at sales are constantly employed by the vendors. 2 Bro. Cha. Ca. 331. And many valuable estates in Pennsylvania are held under sales by executors at public vendue, where the purchasers have next day re-conveyed the premises to one of the executors. We deny that any case can be cited where it has been decreed in equity, that if two or more executors or trustees sell lands at public outcry, and the title becomes vested in one of them by the intervention of a third person, that such sale has been disallowed. It is not within the mischief of the cases cited. We further deny the fact of Kreeber's being originally interested in the purchase, and offer the oath of Kreeber and the lessors of the plaintiff on this point, to remove all doubt. [This offer was refused.]

The deed offered by the executors for two distinct parcels of land, is too absurd to need animadversion. A losing bargain will be decreed in equity as well as a beneficial one. 2 Vern. 398, 423. We therefore infer that this is such a case, wherein chancery would decree a specific execution, and consequently that the plaintiff is entitled to recover under the established usage of Pennsylvania.

Philip and his heirs, born of his present wife, Eve, forever, with covenant of warranty." The question submitted to the Court for their decision, was, whether the lands intailed by this deed, descend agreeably to the course of the common law *per formam doni*, or are to be distributed according to the acts of assembly regulating the estates of intestates. In case the Court should be of the latter opinion, then judgments to be entered for the plaintiffs on the day in bank; if otherwise, for the defendant.

For the plaintiffs it was contended, that wherever the ancestor takes an estate of freehold, and an estate is limited either mediately or immediately, to his heirs, they are to be deemed words of limitation and not of purchase. *Shelly's case*, 1 Co. 10^a, *a*. This rule is unshaken; where the heir takes in the *character* of heir, he must take in the *quality* of heir. *Jones vs. Morgan*, 1 Bro. Cha. Rep. 216. All heirs taking as heirs, must take by descent. *Ib.* 219. In England, the leading custom is that the eldest son shall inherit lands; but it is otherwise in Pennsylvania, where all the children, by the act of 1705, are put upon an equal footing, except that the eldest son takes a double share. The intestate act of 1705 is a general law of descents and distribution. *Dall.* 482. One co-heir shall have contribution against another co-heir, under our laws of descent. *Ib.* 484, 485. Our constitution and laws favor equality among the heirs, and distribution of estates. *Ib.* 178.

The children of an intestate take by descent, analogous to the heirs of gavelkind lands. Where lands of the nature of gavelkind are given to B and his heirs, he having issue divers sons, all his sons after his decease shall inherit. *Co. Lit.* 10, *a*. One seized of lands in gavelkind gives or devises the same to a man and his *eldest* heirs, he cannot hereby alter the customary inheritance, and the law rejecteth the adjective "eldest." *Ib.* 27, *a. b*. All the issues shall inherit an estate tail in gavelkind lands. *Weeks vs. Carvel, Noy*, 106. Upon recovery of lands in borough English, writ of error descends according to the lands. 1 *Leon.* 261. He who is special heir by the custom, as of borough English land, shall bring the writ of error, and not the heir at common law. 4 *Leon.* 5; 2 *Bac. Abr.* 195. A conveyance of gavelkind lands, obtained from persons uninformed of their rights, was set aside, though there was no actual fraud or imposition. 2 *Bro. Cha. Rep.* 151. A having three sons, B, C, and D, D died leaving a daughter, E. A purchased lands in borough English and died; adjudged they shall descend to E. 2 *Lord Raym.* 1024. Each son takes an equal part of gavelkind lands,

but the youngest son takes the whole of borough English lands. Ib. 1025. One seized of lands in borough English, made a feoffment to the use of himself and the heirs male of his body begotten, *secundum cursum communis legis*, and held that the youngest son shall have them by descent notwithstanding. Dy. 179, *b.* pl. 45. *Heirs male* of testator's body may be meant as synonymous to *issue male*. Cowp. 314. In a provision for children by marriage settlements, all are entitled; for as there are no children in *esse* before marriage to whom it can be applied, it must mean all, and there is no place to draw the line in, nor any reason why it should be for one more than another. It is a parental provision made as a debt of nature, and therefore all are entitled. 1 Vez. 114. We are credibly informed, that a decision similar to what we contend for has taken place in Connecticut in the case of *Chester vs. Chester*, and we further contend that our construction supports the real intention of the conveyance, and the true spirit of the laws and constitution of this commonwealth. We have nothing further to do with the pride of family in the character of an elder son.

The counsel for the defendant were prepared to proceed in the argument, when they were told by the Court that they would be saved that trouble.

The Court observed that it was too late now to stir this point, whatever reason there might have been for it in the first instance. The invariable opinion of lawyers since the act of 1705 has been, that lands intailed descended according to the course of the common law, and it has been understood generally, that it has been so adjudged in early times. All the common recoveries which have been suffered by the heirs of donees in tail have been conformable to that principle; to unsettle so many titles at this late day would be productive of endless confusion. As to gavelkind lands, it is observed by Mr. Hargrave (*Co. Lit.* 10 *a*, note 3) that all the sons are as much heirs to *such* land, as the eldest son is heir to land descending according to the course of the common law. The custom of gavelkind extends to estates tail, and that, too, irresistibly, according to some authorities, and cites Dy. 179, *b*, Robins. Gavelk. 94. On this *custom*, therefore, alone, depend all the resolutions.

Our act of 1705 only regulates the descent of lands amongst the children, where the father is seized thereof, and might dispose of them by deed or will. It leaves other cases of descent as they were at common law; and hence an elder brother succeeds to the estate of a younger brother, who dies intestate, un-

enter and take possession, &c. which clearly would carry a fee. The great and general intent of the testator must control the operation of the words. The plaintiff insists, that he intended his two sons, John and Ezekiel, should enjoy the absolute interest in his lands, subject to one contingency—their having issue. In defect whereof the lands were to go wholly to the survivor. The executory devise over is not too remote. It is to take effect within the compass of lives in *esse*, and the law will supply to issue, the words “then living,” the remainder being limited to the “survivor.” The word “unmarried,” is tautologous. It is evident there could be no “lawful issue” without a lawful marriage. So it is held, Cro. Car. 154, that “unmarried and without issue,” means only not having issue. [S. C. more fully stated, W. Jon. 205.] Devise to trustees in fee: if B attains 21, or has issue, to B and the heirs of his body; but if B dies before 21, and without issue, then over. B attains 21 and dies without issue. Decreed, that an estate tail vested in B at 21, or on having issue, and the limitation over a remainder, which takes place on failure of issue of B. 1 Vez. 243.

For the defendants it was insisted, that if John took an estate in tail, under the devise from his father, then it was barred by the common recovery, and the surrender of the widow made a good tenant to the *præcipe*. Shep. Touch. 44. Cro. El. 718.

If John took an estate in fee in the lands, then both events of his dying unmarried and without issue, must take place before the estate could be divested. These are the express words of the will, indicative of the testator's intentions. Devise to one in fee, and if he dies in his minority, and without issue, then over; the estate vests on his coming of age. Arg. Hard. 148, but no opinion given by the Court. Devise to his son and heir, and if he dies before 21, and without issue of his body then living, then remainder over. Held, that devisee took an estate in fee, and his sale when of age is good, for the estate tail is limited to commence on a subsequent contingency. 1 Sid. 148. Devise of lands to his son and his heirs, and in case his son die before he attain to 21, or have issue of his body living, then to F C; the son lives to 28, but dies without issue. Adjudged that the land shall go to the heir of the son. Pollex. 645. Devise to A in fee, but if he dies under age, or unmarried, and without issue, then over; all the events must concur to defeat the estate. 2 Stra. 1175. Devise in fee, but if he died unmarried, or in his minority, or without issue, then over; if the devisee died of full age, though unmarried and without issue, the estate shall not go over. 1 Wils. 140. [S. C. 3 Atky. 390, but stated differently.]

In these last three cases the word "or" has been construed "and," to effectuate the manifest general intention of the testator. So in 3 Atky. 193. And for the same purpose in 1 Vez. 15, "and" was construed "or," and the words of a will were transposed. In our case there is no occasion for the exercise of such power. The words are clear and explicit, and fully convey the testator's ideas. Devise of lands to his wife, till his son came to twenty-one, and then that his son should have the land to him and his heirs; and if he dies without issue before his said age, then to his daughter and her heirs, this is a good contingent, or executory devise to his daughter. If the son lives to twenty-one, though he dies without issue, or leaves issue, though he die before twenty-one, yet the daughter is not to have the lands, because he is to die without issue and before twenty-one, or else the daughter cannot take. 1 Equ. Ca. Ab. 188, pl. 8. Cites 2 Rol. Rep. 197, 217. Palm. 132. The intent of the testator shall govern, and must be collected from the will itself. Perk. § 555.

By the Court. If the words of the devise (Vide Cro. Jac. 695; Dyer, 330, 331; Cro. El. 525) should be supposed to give an estate tail to John, then clearly the issue and remainders were barred by the recovery had in 1773. If he thereby took an estate in fee simple, according to the cases cited [and Moor, 464], then it is to be considered whether the failure of issue on his part vests the lands in his brother Ezekiel. The intention of the testator is the great, governing rule, since a man may devise his lands as he pleases, if his disposition of them be consistent with law. In construing a will, no word is to be rejected, which is not repugnant to the general intent. Courts of justice will transpose the clauses of a will, and construe "or" to be "and," and "and" to be "or," only in such cases when it is absolutely necessary so to do, to support the evident meaning of the testator. But they cannot arbitrarily expunge or alter words, without such apparent necessity. In the will before us, the sense of the testator is clear and entire, from the words he has used. He probably intended to tempt his sons to marry, and therefore subjected their lands to that condition. Would it be reasonable, or consonant to their father's meaning, if either of them formed such a connection, that he should not have it in his power to make a provision for his wife, in case she survived him? The case in Cro. Car. 154, is of a condition precedent to the party taking the estate; and it is to be noted there that the *habendum* expounded the latter clause. It is mentioned in 2 Stra. 1175, to be considerable, that the case there was not a condition

memorandums, therefore, should have accompanied the deposition. Evidence overruled.

The plaintiff's counsel then attempted to supply the proof by other testimony; and after going a considerable length in the cause, it was agreed to refer the matters in dispute to the jury, or any nine of them.

Messrs. Lewis and Tilghman, *pro quer.*

Messrs. Ingersol, M'Kean, Heatly, and Duncan, *pro def.*

WILLIAM DAGNE vs. DANIEL KING, and ELIZABETH, his wife.

Where there has been a conveyance of lands by courses and distances which truly describe the premises, but the quantity of land said to be conveyed is deficient, and no express covenant insuring such quantity, covenant will not lie to recover damages.

COVENANT. Plea, covenants performed. The plaintiff grounded his suit on an indenture between the parties, dated 2d August, 1791, whereby the defendants, in consideration of 550*l.*, conveyed to the plaintiff a certain tract of land, situate in Bristol township, in the county of Philadelphia, by metes and bounds, containing 66½ acres (which had been conveyed to King by a sheriff's deed on the 6th December, 1784), subject to the payment of a mortgage of 325*l.* with a covenant of special warranty therein. The breach assigned was, that the lands sold did not contain the quantity of 66½ acres, but was deficient therein at least six acres, and that the defendants interrupted the plaintiff in the quiet enjoyment thereof.

Mr. Heatly, in support of the action, insisted that the defendants had been guilty of a breach of their covenant. It was admitted that there was a deficiency in the quantity of six acres, but that the courses and distances in the deed exactly corresponded with the boundaries of the land. The object of the plaintiff was to purchase a farm of 66½ acres, and the defendants conveyed him that quantity. There is no set form of words necessary to be made use of in creating a covenant, and therefore any will do which show the parties' concurrence to the performance of a future act. Bull. Ni. Pri. 4to ed. 153.

There are some words which of themselves import no express covenant, yet in certain contracts amount to such, and are therefore covenants in law; as where a man leases lands for years by the words *concessi* or *demisi*, if the lessee be evicted, he may have covenant; so if an assignment be made by the word *grant*, so the words *yielding* and *paying* make a covenant

for paying of rent. 5 Co. 17; Carth. 98; 2 Rol. Rep. 399; Stiles, 406; Shep. Touchst. 160, 169. On the whole of the instrument it may be fairly inferred, that the defendants covenanted that the lands contained $66\frac{1}{2}$ acres.

Mr. Thomas, for the defendant, argued that there was no express covenant in this deed, insuring to the plaintiff the quantity of $66\frac{1}{2}$ acres; nor any *technical* words, whereby an implied covenant could be raised for this purpose. The deed does not contain the words "grant, bargain, and sell," which (1 State Laws, 79) would amount to an implied warranty; but if even those words had been inserted, they would have amounted to no more than a covenant, that the party was seized of an indefeasible estate in fee simple, as to the lands described therein. The indenture in question refers to the sheriff's deed, and the plaintiff has peaceably enjoyed all that was meant to be conveyed to him. The courses and distances are expressed in the deed, and it was the plaintiff's negligence in not having them protracted by a skilful surveyor. The deficiency is obvious on the face of the deed, and the case is analogous to the sale of a horse without an ear or tail, to which a common warranty does not extend. 3 Bl. Com. 165. The vendors have sold lands within certain metes and bounds, which were vested in them under a sheriff's sale, and if upon calculation they should be found to contain 100 acres, no recovery could be had on account of the surplus land, and therefore on the principles of reciprocity, the vendee ought not to recover, when it happens there is a deficiency.

Per Curiam. This action, instituted against the husband and wife, is novel to us, as well as the question itself. If the plaintiff wished to secure himself, as to the lands holding out $66\frac{1}{2}$ acres, he should have had an express covenant for that purpose. It was his own folly not to have had the quantity of land contained within the metes and bounds described, calculated. Here is a sale of lands by courses and distances, which are truly descriptive of the premises. If there had been a surplus of 20 or 30 acres, the seller must have been satisfied with the sum he had received, and could obtain no further compensation therefor; and it would be unreasonable there should be a recovery against him, where it turns out to be short in quantity.

Cases of this kind must frequently have happened before, and yet we never heard of a suit being brought under such circum-

claim; but by their "admission of the claim," they dispense with the tender, and put him precisely in the same state as if a tender had been made.

But *by the Court*. It was certainly admitted at the trial that no payment or tender of the purchase money had been made, otherwise that question of fact would have gone to the jury for their decision. The words of the act of assembly of 21st December, 1784 (2 Dall. edit. 235), are express and decided, that the consideration money should be tendered to the receiver general, on or before the 1st November, 1785. From this source, and his settlement, arises the plaintiff's right of entry, and it was incumbent on him to make proof thereof at the trial; his failing to do it was a proper ground of nonsuit, which must be affirmed.

Messrs, Ingersol and C. Smith, *pro def.*

HENRY SPONG, et al., assignees of CATHARINE HART, vs. JOHN LESHER.

A new trial will not be granted where a brother-in-law of one of the plaintiffs was sworn on the jury, and the plaintiff's attorney being informed of it, offered to waive the juror, provided the defendant would consent to swear another in his room, and go on with the trial, no injustice having been done by the verdict.

MOTION for a new trial, the cause having been tried at the last assizes for Berks county, before Shippen and Bradford, justices.

The grounds of the motion were: One of the jurors was a brother-in-law of one of the plaintiffs, but the same was not known to the defendant, or his counsel, when he was sworn. Immediately afterwards, notice was given to the plaintiff's attorney, who agreed to waive the juror, provided the defendant would consent to swear another in his room, and proceed in the trial; this the defendant's counsel refused. The trial went on, and after a full defense made, the jury found a verdict for the plaintiffs, under a decided charge from the Court.

Mr. Ingersol, *pro def.*, now cited 3 Bl. Com. 363. A juror being of kin to either party, even within the ninth degree, is a principal cause of challenge. Jurors should be "*omni exceptione majores*." If a party have cause of challenge, and knows of it time enough before the trial, if he does not challenge, he shall not have a new trial. *Contra*, if he has not timely notice of it. 11 Mod. 119.

The defendant was not bound to accede to the plaintiff's propositions, or to give his consent to swear another juror, and go on with the trial. Perhaps the Court might have set aside the

juror, who was so nearly of kin to the plaintiff, and swore a more indifferent person ; but, as the plaintiffs have not asked for the Court's interposition, on the intimation of the cause of challenge, it is error, for which a new trial should be granted.

Mr. W. M. Smith, *E contra*. The defendant made a full defense, and the charge of the Court was unequivocally with us. When the justice and equity of the cause is on the side of the verdict, a new trial will not be granted. 2 Wils. 307.

Per Curiam. The defendant has laid no merits before us on which we can exercise a legal discretion. He made a full defense at the trial, and does not now complain that injustice has been done him. The charge of the judges who tried the cause was clearly with the plaintiffs. And though the Court might, on the trial, have discharged the exceptionable juror, and swore another in his room, without any consent of the defendant, yet it would be very unreasonable that the defendant should now avail himself of his not consenting to change the juror.

Judgment for the plaintiffs.

LESSEE OF ROBERT CAMPBELL vs. JOHN SPROAT and ALEXANDER
SNODGRASS.

It is no ground for a new trial, that the judge who tried the cause inclined that the weight of evidence was with the plaintiff, and the jury found for the defendants.

MOTION for a new trial. Mr. Justice Shippen reported the evidence which appeared before him on the trial, at Lancaster, on the 30th May last, as follows : —

It was admitted that John Sproat, one of the defendants, was seized of the premises in question.

Early in the morning of the 5th May, 1788, he entered into a parol contract with Snodgrass, the other defendant, for the sale of the property ; and it was agreed between them that 100*l.*, part of the consideration money, should be paid down, to discharge a debt due from the vendor, by judgment, to Campbell, the lessor of the plaintiff, and the remainder by instalments of 40*l.* per annum ; the price to be ascertained by arbitrators mutually to be chosen. Sproat was a weak man, but made this sale with the consent of his wife and children, who were grown up. Some kind of possession was delivered by Sproat to Snodgrass, in pursuance hereof, by putting some of his young cattle into a field.

The same morning, between 11 and 12 o'clock, Sproat, at

some distance from his own house, entered into a written article of agreement with Campbell, whereby he "sold and delivered" the same lands to Campbell in consideration of 270*l.*, whereof 100*l.* was to be paid in hand, and the residue in payments of 40*l.* per annum. Certain privileges were reserved to Sproat, who covenanted to make him a deed on the payment of the 100*l.* No words of inheritance were expressed in this article, but some kind of possession was also delivered in pursuance thereof. The family of Sproat were averse from this agreement, and much dissatisfied therewith.

On the evening of the same day, Snodgrass, with full knowledge of what had passed in the morning between Sproat and Campbell, obtained a deed of the premises from Sproat and his wife, in consideration of 270*l.*, which was regularly acknowledged and recorded. And certain privileges were also secured to Sproat, by Snodgrass.

Much parol evidence was given, tending to show, on the one hand, that the sale to Campbell was made with all imaginable fairness; and, on the other hand, that he had attempted to take advantage of the necessities of Sproat, who was indebted to him by judgment, by procuring the sale of a great part of his woodland at an undervalue; and some circumstances were shown, tending to prove that he knew of the first parol contract with Snodgrass.

Campbell tendered the first payment to Sproat, on which he was to have his deed, and Snodgrass tendered to Campbell the moneys due on his judgment, and paid off the bonds which became due on the sale.

On the part of the plaintiff, it was insisted that the words of the article to Campbell would operate as a deed of conveyance to him, being in the present tense, "do sell and deliver." But if it was to be considered merely as an agreement, that it was such a one whereupon a Court of Equity would decree a specific execution.

On the first head, I thought it should be considered merely as an agreement, because such was evidently the intention of the parties, and it contained future executory acts, as the making of a conveyance, payment of money, &c., and because no words of inheritance were expressed therein, and which therefore would have vested Campbell with an estate for life only.

The second point depended on the establishment of previous facts; as whether Campbell knew of the prior verbal sale to Snodgrass, or took any undue advantages of the necessities of Sproat, which I wholly submitted to the jury for their consideration.

I inclined that the article should prevail against the parol sale,

in case the former had been executed with all imaginable fairness; and the weight of evidence rather appeared to preponderate in favor of the plaintiff. But it was fairly left with the jury to determine the facts on the whole circumstances of the case, taken collectively. The jury found a verdict for the defendants.

The counsel for the plaintiff now brought forward several depositions, tending to show, that Sproat had expressed himself since the trial, that the sale to Campbell was perfectly fair, and without fraud or imposition; and therefore contended he should under this new additional evidence, be let into the benefit of a new trial, on payment of costs.

But, *by the Court*. Sproat appeared on the trial, to be a very weak man, and little stress is to be laid on his expressions. Much evidence was given on both sides, which was fairly stated, and left wholly to the jury. They were the constitutional tribunal to judge of the parties' intentions. Though the judge who tried the cause, inclined that the weight of the evidence was with the plaintiff, yet it is no ground for awarding a new trial, that the jury have differed from him in opinion. Were the rule otherwise, such motions would greatly multiply on us, and the greatest inconveniences would ensue. If the plaintiff is dissatisfied, he can institute a new ejectment, and bring forward all his proofs to a second jury.

[Vide 5 Burr. 2805; 1 Wils. 22; 2 Stra. 1142; 12 Mod. 439; 2 Wils. 249; Andr. 325, 328; 5 Bac. 246; 1 Burr. 397; 3 Bl. Com. 392; Lofft, 147, 391, 529.

Judgment for the defendants.

Messrs. Ingersol and Montgomery, *pro quer*.

Messrs. Tilghman, C. Smith, and Hopkins, *pro def*.

JOHN WARD vs. LEWIS HALLAM.

A citizen of South Carolina is not within the saving of the limitation act of 27th March, 1713.

This was an action brought on a promissory note, wherein judgment was entered for the plaintiff, subject to a point reserved, which shortly was:—

The plaintiff was a citizen of South Carolina, and the defendant a citizen of Pennsylvania for above six years previous to the

commencement of the suit. The doubt was, whether the act of limitations barred the plaintiff from a recovery of his demand.

The point was argued at the last April term, by Mr. Rawle, for the plaintiff, and Dallas, for the defendant.

On the part of the plaintiff, it was urged, that the construction of the act of assembly of 27th March, 1713, pa. 69, had always been, that persons out of the former province (now state), were within the saving of the act. There is a material difference in the penning of our act and the British statutes of 21 Jac. 1, c. 16, and 4 and 5 Ann. c. 16. The words of the former statute, § 7, are plaintiffs "returned from beyond seas." 3 Ruff. stat. 102; the latter statute, § 19, saves the rights of absent defendants "till after their return from beyond the seas." 4 Ruff. stat. 207. But the last proviso in our act has a saving "in case of persons *beyond sea* at the time of the cause of action accrued, who shall be at liberty to bring their actions within such times as are thereby before limited, after their returning into this province, as other persons." In 1 Bl. Rep. 286, it is well remarked by Morton, that until the union of the crowns under James the first, the constant language of the legislature, was "persons out of the realm." But when the whole island came under the government of one prince, the language was altered to persons "beyond the seas." Our legislature, by omitting the words of an act of parliament, must be supposed to do it intentionally, and not accidentally. Dall. 27.

The words of our act must not be taken in a strict geographical sense as to persons "beyond sea;" for in such case, they might not even be extended to Brazil, which would be highly absurd. The plain question is, whether persons out of the jurisdiction of the Courts of this state, though not literally beyond sea, are not entitled to the same benefit?

On the part of the defendant, it was said, that no such construction had prevailed, as was contended for by the plaintiff. The proviso in favor of absent plaintiffs, under the act of 1713, was expressly confined to persons "beyond sea," and the subsequent words "after their returning into this province," will not narrow the first expression or distance. The clause in the statute of 21 Jac. 1, c. 16, has been adjudged to extend only to persons, who are *actually* beyond seas; and one resident at Glasgow, in Scotland, was held not to be within the proviso of the statute. 1 Bl. Rep. 286; 1 Espin. 153. If the plain meaning of the words of the act are not to be pursued, it may be as well contended that the right of a person on the shores of New

Jersey, opposite to the city, is saved, which would be full as absurd as the case of the foreigner in Brazil.

The Court took time to advise, and now the chief justice delivered their opinion.

The only difficulty we felt on the former argument arose from our doubts whether the judicial authorities in our sister states might not have pronounced the citizens of other states to be within the savings of their acts of limitation; but our minds are now relieved on that score, from the inquiries we have made.

The words, "beyond sea," in our act, have a clear, definite meaning, about which there can be no doubt, or difficulty. The state of South Carolina cannot be deemed beyond sea, as to our own state. Mr. Justice Wilmot, in 1 Bl. Rep. 287, calls the statute of 21 Jac. 1, c. 16, a noble beneficial act, and says it should be construed liberally. We may, with equal propriety, assert the same of our own Act of Limitations. And, judging according to the expressions the legislature has made use of, we are bound to say that a citizen of South Carolina is not within the saving.

We have made the most minute inquiries into the practise of other states in this particular; and the result has been, that their resolutions have been very generally the same as what we now pronounce. In the case of *Gustin vs. Brattle*, in Connecticut (Kirby, 299), absence at Halifax, beyond the jurisdiction of the United States, was adjudged not to be beyond sea, within the intent of their Statute of Limitations. It is true the judgment is said to be reversed in the Supreme Court of Errors. Kirby, 310. There were three points made in that cause, but on which of them the judgment is reversed is not stated in that report. We have been well informed the reversal was not had on the point now before us.

Our opinion, unanimously, therefore is, that judgment should be entered in this action for the defendant, as in case of a non-suit. [See 3d Wheaton, 541.]

RICHARD ROE, lessee of ROWLAND EVANS, vs. JAMES DAVIS.

One devises "all the rest and residue of her estate to J during the term of his natural life, and if he leaves lawful issue, then she gives her real estate unto such issue; but in case of his dying without such issue, or they dying under twenty-one and without lawful issue, then she devises all her real estate to A, his heirs and assigns, on condition that he or they pay to the managers of the Pennsylvania Hospital 800*l*. in three months after the decease of J." Adjudged that J took an estate in fee tail, which was forfeited to the state by his attainer of treason, till he and his issue should be extinct; and the remainder limited to A is a vested remainder, which may well take effect on the payment of the 800*l*.

EJECTMENT for messuages and lots of ground in the city of Philadelphia, wherein a case was stated for the opinion of this Court, viz:

Sarah Parrock being seized in fee of the premises in the declaration mentioned, made her last will and testament in writing duly proved and registered, whereby (*inter alia*) she devised as follows:—

"I give, devise, and bequeath, all the rest and residue of my estate, whatever and wheresoever, unto my dear and beloved brother, John Parrock, during the term of his natural life, and if he leaves lawful issue, then I give my real estate unto such issue; but in case of my said brother departing this life without such issue, or they dying under the age of twenty-one years, and without lawful issue, then I give, devise, and bequeath all my real estate, of what kind soever, unto my esteemed friend, Abel James, of the city of Philadelphia, merchant, his heirs and assigns, on this condition: that he or they pay to the managers of the Pennsylvania Hospital, for the time being, the sum of 300*l*. lawful money of Pennsylvania, in three months after the decease of my said dear brother. And I do hereby authorize the contributors of the said hospital, for the time being, to demand and recover the same."

This will bore date on the 13th July, 1773, and Sarah Parrock, afterwards, in August, following, died seized of the premises in the declaration mentioned.

The said John Parrock, the devisee, entered into the premises, and was possessed thereof.

In 1778, John Parrock became duly attainted of high treason according to the laws of this commonwealth, and a proclamation, bearing date 1st May, 1778, for having adhered to the enemies of the United States of America in the war with Great Britain, and his estate, real and personal, was forfeited, agreeably to the laws of the said commonwealth.

The agents for forfeited estates seized the premises in the declaration mentioned, as a part of the estate of the said John Parrock forfeited to the commonwealth, and the Supreme Executive Council sold and conveyed the same by patent, under which the defendant holds.

Abel James, in his life-time, to-wit, the 15th day of September, 1779, exhibited to the justices of the Supreme Court his claim of and for the premises in the declaration contained (*in*

ter alia) and the said justices did thereupon decree a dismissal of his said claim, which decree remains in full force and unaltered (See Dallas, 47).

On the 1st January, 1784, Abel James made his last will and testament in writing, and thereby devised the premises (*inter alia*) to John Thompson and Rebecca, his wife, Chalkley James, Joseph James, Abel James, and the testator's widow, Rebecca James, and Thomas Chalkley James, his sons and daughters.

On the 29th July, 1784, Abel James, and Rebecca, his wife, granted and conveyed by deed the premises in the declaration mentioned (*inter alia*) to John Field, Joseph Swift, Henry Dinker, and Cadwalader Evans, in trust for certain uses therein contained.

In October, 1790, Abel James died; and in May, 1791, John Parrock died, having never had any issue.

On the 27th June, 1791, John Field, Joseph Swift, Henry Drinker, and Cadwalader Evans leased the premises for 21 years (*inter alia*) to Rowland Evans, the lessor of the plaintiff.

On the 27th June, 1791, John Thompson and Rebecca, his wife, Chalkley James, Joseph James, Joseph Smith, and Martha, his wife, Abel James et al. leased by deed (*inter alia*) the premises in the declaration mentioned, to the lessor of the plaintiff, for 21 years.

On the 28th June, 1791, Henry Drinker, one of the assignees of Abel James and wife, and John Thompson, one of the executors named in the will of the said Abel, paid the sum of 300*l.* to Mordecai Lewis, treasurer of the contributors to the Pennsylvania Hospital, the legacy left to that institution, by the last will of the said Sarah Parrock.

The questions submitted to the decision of the Court, under the preceding case, were: What estate was forfeited to the commonwealth by the attainder of the said John Parrock? and whether the plaintiff was entitled to a recovery of the premises?

This case was argued at the last April term, by Messrs. Tilghman and Wilcocks, for the plaintiff, and Messrs. Sergeant and Coxe, for the defendant (Mr. Lewis, for the plaintiff, and Mr. Ingersol, for the defendant, having declined speaking thereto).

On the part of the plaintiff, it was contended that if an estate tail in John Parrock was forfeited to the commonwealth by his attainder, then when the issue of the said John ceased, the estate of Abel James commenced. In Dallas, 48, this Court held that John Parrock, under his sister's will, took an estate tail.

His issue were to take in succession, which they could not do without a previous estate of inheritance in their father. It has been held in the case of Captain John Gordon, in the House of Peers, Fost. 95, 103, that a forfeiture in high treason, in cases of estates tail, operates as long as the issue in tail shall continue, but no longer. The king shall have the land as long as the estate tail continues. Hob. 334. A base fee vests in the king, determinable on the tenant in tail dying without issue. Tenant in tail with reversion to the king, there is a corruption of the blood on his attainder, his estate tail ceases on his death, and the land reverts to the king: *aliter*, when the reversion or remainder goes to a subject. Ib. 345, 346. Lord Sheffield *vs.* Ratcliffe. The king has a qualified fee so long as the estate tail continues. Plowd. 557; Walsingham's case; cited 2 Bac. Abr. 125. The continuance of the estate tail is necessary to continue the estate held by the forfeiture. Plowd. 559. And Saunders chief baron, delivered the judgment of the Court, wherein he approved of its being a base fee. Ib. 561. Tenant in tail forfeiting his land, the king has it during the estate tail, but no longer. 13 Vin. 440, pl. 10; cites 2 Anders. 139; Corbet's case; S. P. Jenk. Cent. 286, pl. 21. Tenant in tail attainted of treason, and the king grants the land to J. S. who bargains and sells to B, against whom a *præcipe* is brought, who vouches J. S. and so a common recovery had, this shall not bar the remainder, because J. S. does not come in, in privity of the tail. 18 Vin. 197, pl. 3. Tenant in tail is disabled by attainder from suffering a common recovery. Pigot, 73, 74; Cites Godb. 218. Tenant in tail attainted, suffers a recovery as vouchee, and adjudged good. 1 Keb. 398; Holland *vs.* Fisher.

But it may be asserted that there is a difference between the words of the statutes in England and our act of assembly of 6th March, 1778. Upon a critical examination of them, no substantial difference will be found.

By § 5, of the act of 1778, the respective *estates and interests* of the attainted parties are forfeited; and § 17 saves all remainders and reversions on entry of the claims in the Supreme Court in the manner therein prescribed. It may be fairly inferred, that contingent remainders are thereby saved, in case of the determination of the particular estate. The resentment of the legislature was levelled at the offending character alone.

The decree in the Supreme Court on the dismissal of the claim of Abel James, can have no effect in the present action; for, by § 8 of the act of 29th March, 1779, it is directed, that this act shall not debar any persons, who claim by title paramount to the attainted or convicted traitor, from suing their

actions at law; and in § 9 there is an express provision, that purchasers evicted in ejectment shall be paid the value of their estates out of the treasury of the commonwealth, where the recovery is had by any persons having a lawful title thereunto at the time of the said sale, or afterwards, by *remainder* or *reversion*, within twenty years after the lands shall be sold, &c.

The only difficulty remaining is, whether the remainder limited to Abel James, under the will of Sarah Parrock, was vested or contingent; for if it was a vested remainder, it will clearly take effect, notwithstanding the destruction of the particular estate. Devise of land to C, and the issue of his body *living at his death*, and for want of such issue, to the University of Oxford; decreed that the issue took an estate tail; the issue were not to take by remainder, but by descent, and, as all the posterity were intended to take it, it would not be a contingent remainder, but a clear estate tail. Per Henley lord-keeper. Ambl. 385. Under a devise to A for life, and after his decease, to and amongst his issue, and in default of issue, then over, A takes an estate tail. 4 Term Rep. 82, 87. An estate is vested in interest where there is a present fixed right of future enjoyment. Fearne Cont. Rem. 2.

For the defendant it was said, that the decree of the Supreme Court on the claim of Abel James respecting the lands therein contained, was final and conclusive.

This case does out depend on the British statutes, but on our own acts of assembly made for special purposes. It is not contended that this forfeiture arose on the act passed 11th February, 1777 (1 St. Laws, 18), for that respects a forfeiture incurred by a conviction in a Court of Oyer and Terminer, and does not reach this case. But it arises on the act passed 6th March, 1778 (1 St. Laws, 98), which directs, § 3, that persons not surrendering themselves on the day fixed by proclamation, shall undergo all such forfeitures as persons attainted of high treason ought to do; and in § 5 it is declared that all the estates, real and personal, whatever, of such traitors, shall be forfeited according to their respective estates and interests therein. In the close of this section, very general words are made use of: "or might forfeit by such attainder." This shows the sense of the legislature; that the estates of persons attainted of high treason under this act should escheat to the state, with all their *incidental* rights.

The statute of 26 H. 8, c. 13, forfeits estates tail by force of the words, "of any estate of inheritance." 2 Haw. 453, § 22. Fost. 100. This statute *saves* to all persons their rights at the time of the treason committed, or at any time since. The same is

then to such issue male, and his heirs, forever, and if he should die without issue male, then to B, and his heirs, forever; it was holden that the first remainder to the issue of A was contingent, and being in fee, the limitation over to B was therefore contingent, also. 2 Woodeson. Eng. Law, 208, 209; cites 1 Ld. Ray. 208. Though the second devise in fee cannot be properly termed a remainder in respect to the former devise *in fee*, yet in respect of the *life estate*, they were both contingent remainders in fee, and as such barred by a common recovery suffered. 1 P. Wms. 509.

Wherefore it was prayed that judgment should be rendered for the defendant.

The cause was continued over, under a *curia advisare vult*; and now in this term the judges pronounced their opinions, in solemn arguments, on the bench.

M'Kean, C. J. After fully stating the case and the questions before the Court:—

Abel James, on the 15th September, 1779, filed his claim to an acre and a half of land, in the Northern Liberties of Philadelphia, being parcel of the devise to John Parrock. He therein set forth that "John Parrock having no children, and not being likely to have any, he thought he would be entitled to the fee of the premises; and therefore prayed the Court to consider the premises, and make such decree therein as was agreeable to law and justice."

On the 13th of April, 1780, the Court having heard Mr. Sergeant, then attorney general, in behalf of the commonwealth, and Mr. Lewis for the claimant, dismissed the claim.

It appears that a supplement to the act of attainder had passed on the 29th of March, preceding, by the 8th section of which any person, other than such as claimed *under* the attainted or convicted traitor, might bring his *action* for any lands seized as the estate of such traitor, in *any* of the Courts of record in the state, in the usual way, and have a trial by jury. James's claim not being for the *payment of money*, or *satisfaction out of John Parrock's estate*, was therefore improperly brought before the Supreme Court in that way, and could answer no purpose, unless to get their opinion on an *abstract* question, not cognizable by them, without the intervention of a jury. However, as it had been disputed between the counsel whether John Parrock's estate was for life, or in tail, the Court found no difficulty in delivering their opinion that it was an estate tail; but no opinion was given whether Abel James had a *vested* or *contingent* remainder in it, nor was that point debated in Court. Abel James had

exhibited his claim but for a small part of what had been devised to John Parrock, to the whole of which he had an equal right. This circumstance was not unnoticed. Besides he had not then, and might never have any right to the possession of the premises; whenever he should, it would then be time enough to bring his ejectment, or other action. In every view, therefore, it appeared to be premature and improper, and hence the claim was dismissed.

Having premised thus much, that the report in Dallas, 47, may be fully understood, I shall proceed to give my opinion on the questions now formally before the Court.

It appears to me, on full consideration, extremely clear, that John Parrock, under the will of his sister Sarah, took an estate tail in the premises mentioned in the declaration; and that the life estate first given to him in express words was merged in the inheritance, to effectuate the manifest general intention of the testatrix; and that if any of his issue successively had lived to the age of twenty-one years, a contingent fee would have passed to such issue, and the limitation to Abel James in such case, could never have taken effect *in possession*. Vid. 2 Wils. 322; 1 Burr. 38; 3 Burr. 1570, 1626; 3 Atky. 784; 4 Term Rep. 82, and many other cases.

By the attainder, all the *estate of John Parrock*, in Pennsylvania, was forfeited to the commonwealth, but no more. It continued in the commonwealth until he and his issue should be extinct; and if he had left issue who should have arrived to twenty-one years of age, it would have continued forever. But as John Parrock died in 1791, never having had any lawful issue, the estate of the commonwealth then ceased, and the premises devised to him became vested *in possession* in the assignees of Abel James, and by their lease, in the lessor of the plaintiff. Plowd. 557; Jenk. Cent. 286, pl. 21; 2 Bac. 125; 4 Bl. Com. 374.

The testatrix devised the premises to John Parrock in fee tail, and if none of the issue lived till of age, the remainder in fee to Abel James. Now though it was uncertain whether any of the issue would live till of age, yet that uncertainty does not make the remainder to Abel James contingent in point of *interest*, but only in respect of the *possession*, and does not come within the definition of a *contingent estate*. 3 Wils. 247.

Wherever there is a particular estate which does not depend on an uncertain event for its continuance, and a remainder is limited thereon absolutely to a person *in esse*, notwithstanding a contingent remainder intervenes between the particular estate and the limitation over to such person, if such intervening limit-

ation does not *vest the fee absolutely*, it is a remainder vested in interest. 1 Co. 137; Hutt. 119.

"It is not the uncertainty of ever taking effect in *possession*, that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable, as the remainder man may die, or die without issue, before the death of the tenant for life. The *present capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." I have cited the words of Fearn's learned Essay on Contingent Remainders, in pa. 149, in illustration of which he has cited several cases.

By this devise to Abel James, it rather seems to me that he had an immediate fixed right of future enjoyment, a *vested interest*, which was transferable or transmissible, though it was uncertain whether it would ever vest in possession; for that depended upon whether any of the issue of John Parrock should live to the age of twenty-one years or not; if any of them had lived so long, the estate would have vested in interest and possession in such issue in fee by interposition, and the vested right of Abel James would have opened and separated itself from the estate tail, and have been gone forever. 3 Atky. 774.

Cases of this sort do not often occur here, but my judgment has been guided by the best information I could obtain; and I confess, I am in a great measure governed by the *plain general intention* of the testatrix, collected from her will, which ought to take place, unless restrained by some rule of law. Upon the whole, the best opinion I can give is in favor of the plaintiff.

Shippen, J. I am clearly of opinion, that the word "issue," in the will of Sarah Parrock, must be construed a word of limitation, in order to effectuate the intention of the testator, to let in the issue by succession, which cannot be done unless the estate given to the father be construed an estate tail.

It has been questioned whether, as John Parrock had the right of suffering a common recovery, when the estate came into the hands of the commonwealth by forfeiture, it did not come with that right annexed to it, so as to vest an absolute fee simple in the state; or whether, only such an estate as was liable to be divested by him in remainder, after a failure of issue of John Parrock.

No cases appear to show that a vested remainder can be forfeited by the attainder of the tenant in tail; but on the contrary,

many authorities have been cited by the plaintiff's counsel, which prove that the king shall hold the forfeited estate only, while the issue in tail remain.

But by the express words of the act of assembly of 1778, only such lands and estates as the persons attainted shall have been possessed of, interested in, or entitled unto, on the 4th July, 1776, or at any time afterwards, in their own right, or to their use, or whereof any other person or persons shall have been possessed of, interested in, or entitled unto, to the use of, or in trust for them, according to the *respective estates and interests*, which the persons attainted, or any in trust for them shall have had therein, or might forfeit by such attainder, stand and be forfeited to the state without any office found, &c.

And by the subsequent act of 1779, there is an express provision, that nothing in this act shall be construed to extend so as to debar or prevent any person or persons, other than such as claim under any attainted traitor, from pursuing his or her action or actions in any Court of Record in the usual way, for the trial of his or her title to any lands seized as the estate of any such traitor.

The first act forfeits only such estates as the traitor had in his own right, or for his own use, according to the respective interests which the attainted persons had therein; the second act expressly saves the rights of all other persons who do not claim under the attainted traitor. The traitor can only forfeit his own right and estate, not the rights and estates of others.

The case, lastly, has been taken up on another ground, viz.: that the remainder in this case is contingent, which is destroyed by the forfeiture of the particular estate on which it depended.

The contingency is, that Abel James, his heirs or assigns, are to have the remainder, on condition that he or they should pay to the managers of the Pennsylvania Hospital the sum of 300*l*. in three months after the decease of the tenant in tail.

There is an express authority given to the contributors of the hospital to recover the 300*l*., which manifests an intention in the testator that it should rather be considered a charge on the real estate than a condition to prevent its vesting in Abel James. To construe it a contingent remainder would clash with the very words of the will, which expressly directs the payment to be made after the death of John Parrock, whereas a contingent remainder must vest, during the continuance of the particular estate, or *eo instanti* that it determine.

The result of my opinion, therefore, is with the plaintiff.

Yeates, J. I fully concur with my brethren, that John Par-

rock, under the words of the will stated, took an estate tail. The general manifest intention of the testatrix clearly was, that the real estate should not go over to Abel James, but upon a failure of issue of her brother. Her design of giving him an estate for life is legally incompatible with her weightier intentions, that her brother's issue should inherit after his death; for if John Parrock had only taken an estate for life, his issue could never have taken; and although it eventually happened that he had no children, yet we must consider this case as if the fact had been otherwise. 2 Wils. 323. There are many determinations which warrant the Court to give that effect to the will which will best answer the devisor's *general* intention, though by so doing we may defeat some *particular* intention. Besides the cases mentioned by the chief justice, and those cited in Dall. 48, vide 8 Vin. Abr. 233. Cowp. 411. 1 Vent. 214. 2 Lev. 58. 3 Keb. 42. 1 Wms. 371, 399, 624. Gilb. Eq. Rep. 149.

It also strikes me strongly, that if John Parrock had sons or daughters who could have inherited this property, they would have taken it also in tail. The limitation is, "to his lawful issue; but in case of my said brother departing this life without such issue, or they dying under the age of twenty-one years and without lawful issue, then the remainder over to Abel James, his heirs and assigns." Whatever were the intentions of the testatrix in fact, she has made use of proper *technical* expressions to convey an estate in fee tail to her brother's children. She uses the words, "issue," "such issue dying without issue," and "heirs and assigns;" and we are bound to say (in the language of Judge Buller, 3 Term Rep. 493) that "she understood the meaning of each, and we cannot substitute one for the other, unless, by unavoidable and necessary construction, in order to make sense of the will." But no such necessity exists in this case. Vide Lit. Rep. 345.

The estate and interest of John Parrock in the premises was forfeited to the commonwealth by his attainder of high treason. The forfeiture operated as long as the issue in tail should continue, but no longer, according to the cases cited by plaintiff's counsel. The estate and interest of the traitor, only, is forfeited by the act of 6th March, 1778; and, by the supplement thereto, it is expressly declared, § 8, that "this act shall not prevent others than such as claim under any attainted or convicted traitor from pursuing their actions in any Court of Record."

The only question which remains to be considered is, whether the remainder limited to Abel James, in fee simple, is a *contingent* remainder (technically speaking) or *vested*. If it is the

former, the *particular* estate of John Parrock being determined by his attainder, the contingent remainder is destroyed, and the commonwealth shall have the fee, discharged of all remainders, according to Palmer's case. Noy, 102. For the remainder cannot vest where the particular estate is destroyed before the contingency happens whereby the remainder becomes vested. 1 Co. 66, 135. But if the remainder to Abel James was vested, then it is otherwise.

A passage from Fearn, 3d ed. 149, 4th ed. 328, has already been cited by the chief justice. The same author, 4th ed. 330, adds: "Wherever the preceding estate is limited so far as to determine on an event which certainly must happen, and the remainder is so limited to a person in *esse* and ascertained, that the preceding estate may, *by any means*, determine before the expiration of the estate limited in the remainder, such remainder is vested." To the same effect are the sentiments of Lord Chief Justice Willes, in the case of Smith on the demise of Dormer *vs.* Packhurst et al. in the House of Lords. 3 Atky. 138, 139.

It is said by Justice Buller, 3 Term Rep. 494, that "Courts of law always lean in favor of vesting estates;" and by Rider, Chief Justice: "It is a known rule of law, that where particular estates of freehold are limited, with particular contingent remainders over to persons not in being, and then comes a remainder over in fee to one in being, that is a *vested remainder*, until the intermediate remainders come in *esse*, and then it opens to let them in." 3 Wils. 246.

A limitation to one for life, remainder to his first and other sons in tail not then in being (which is contingent), with remainder to one in *esse*, the last remainder is *vested*, notwithstanding the intervention of the estates tail. 3 Wils. 247, 248.

A vested remainder may be well limited after an estate tail, whether the estate tail be vested or contingent. 1 Lord Ray. 209. 1 Salk. 224. Lit. Rep. 347. 3 Term Rep. 488 (note a), Ives *vs.* Legge.

But after a contingent fee is limited, no subsequent limitation can be vested. 10 Co. 85. 1 Sid. 47. 1 Lev. 11. Fearn, 3d ed. 160, 161, 276, 277, 294, 295.

Under the authority of these cases, my mind is satisfied that the remainder limited to Abel James was a vested remainder. The intention of the testatrix is clearly expressed, that the death of John Parrock should *precede* the payment of the 300*l.* charged on the lands, and devised to the managers of the Pennsylvania Hospital, and consequently this construction is most agreeable to such intention.

I am, therefore, clearly of opinion, as the executors and assignees of Abel James have, since the death of the said Abel, paid the 300*l.* to that institution, that the plaintiff is well entitled to a recovery of the premises.

Absente, Bradford, J., but he concurred in opinion with the other members of the Court. [See p. 411.]

Judgment for the plaintiff.

[MEMORANDUM.—The Honorable William Bradford, esq., resigned his commission as one of the justices of the Supreme Court the last day of this term, and was appointed attorney general of the United States. The Honorable Thomas Smith, esq., was appointed to succeed him, and his commission *quandiu se bene gesserit*, dated the 31st January, 1794, was published in open Court on the 7th April, 1794.]

APRIL TERM, 1794.

Present, M'KEAN, CHIEF JUSTICE; SHIPPEN, YEATES, AND SMITH,
JUSTICES.

SAMUEL PENROSE and THOMAS FLEESON, executors of PLUNKET FLEESON, *vs.* DANIEL KING, surviving obligor of JOSEPH MOORE.

The presumption of payment of a bond, arising from length of time, shall be suspended between 1st January, 1776, and 31st June, 1784, under the law passed 21st June, 1781.

DEBT 60*l.* *sur* obligation, dated 8th December, 1768, conditioned for the payment of 40*l.* on the 1st January, 1769. Plea, payment, with leave to give the special matter in evidence.

The defendant was security for Moore, a blacksmith, who was deceased, and worked for the plaintiff by supplying him with sundry articles as an upholsterer. He rested his defense on the presumption arising from length of time, there being no receipts indorsed on the bond, or any proof of a demand made on the principal or surety. He also contended, that it appeared from the books of the testator that Moore had settled an account with him on the 27th November, 1770, and received a balance from him of 3*l.* 3*s.* 2*d.*; and thence inferred it was highly probable that the bond had been discharged in some other manner, which could not now be made appear.

On inspection of the books, it appeared that the account was opened on the 9th November, 1761, and continued to the 7th March, 1773. It consisted of a variety of articles furnished by Moore, and of many different sums paid him by the testator. No notice whatever was taken of the bond in any part of the books. The sum of 3*l.* 3*s.* 2*d.* was charged against him as paid in November, 1770, but the same was not the *exact* balance of their dealings in the book. More died in 1780 or 1781, and in the former year made a voluntary conveyance to one William Smallwood, of two small houses and lots of ground in the city of Philadelphia.

For the defendant it was urged, that where no interest had been paid on a bond for twenty years it shall be presumed to be satisfied, and Lord Raymond has left it to the jury on sixteen years, where there were circumstances to fortify the presumption. 1 Espin. 254 (London edit). 1 Burr. 434, calls it 18 years. Cowp. 109. This rule had also been recognized in equity. 2 Atky. 144. Should the time be thought to fall short of twenty years, yet the account settled between the parties and no notice taken of the demand would fortify the presumption of payment. 1 Term Rep. 270. In Cowp. 109, Lord Mansfield lays down the rule that where no interest appears to have been paid for sixteen years, a jury may presume the debt to be discharged.

It was of no moment to the defendant, whether the length of time operated as a positive bar, or the payment was to be inferred from thence under the legal decisions.

For the plaintiff it was said, that there existed no statute of limitations in England respecting personal demands, until 21 Jac. 1, about 1625. The doctrine of twenty years presumption was first taken up by Lord Hale, who was followed by Lord Holt, and afterwards by Lord Raymond. 1 Term Rep. 271. In the case of a bond, Lord Mansfield says (Ib. 272) he believed no positive time had been expressly laid down by the Court; that it might be eighteen or nineteen years.

Under the act of assembly passed 21st June, 1781, 1 St. Laws, 496, Loose Laws, 468, § 10, enacts, that "no debt or demand, which was not barred by any act for the limitation of actions, on the 1st January, 1776, shall be barred by the said act, until two years after passing of the same, and until such time as is limited by law, according to the nature of each case." And the act passed 12th March, 1783, 2 Dall. Laws, 91; Loose Laws, 138, § 6, directs that no act of limitations shall run between the 1st Janua-

ry, 1776, and the 21st June, 1784. And therefore 8 years, 5 months, and 21 days are to be taken from the calculation of time on which the limitation act is to operate. It is true, our limitation act does not mention obligations, but the resolutions of Courts of justice, as to the legal presumption, have sprung from that source; and *ubi eadem ratio, ibi idem jus*. Consequently, if the position is right, there remain only 15 years, 5 months, and 6 days from the time of payment of the bond, until the suit brought, which is, *of itself*, not sufficient to infer a presumption of payment.

There is no corroborating circumstance in this case to fortify the presumption of payment, nor indeed any proof of a settlement of accounts. The sum paid was on the foot of a running account. The jury, therefore, must determine on the circumstances, whether there is proof, satisfactory to their minds, to evince the discharge of the bond.

By the Court. Neither the English statute of 21 Jac. 1, nor our limitation act, prescribes the period when a suit on a bond shall be barred. But the judges there, adverting to the principle on which the statute of James was enacted, have determined that after a certain length of time, the law will presume that a debt on bond has been discharged; and the Courts here have adopted the same idea, in order to prevent stale outstanding debts, founded on obligations, from being recovered, unless the delay can be accounted for.

Our legislature, for wise reasons, have determined that the operation of the limitation act should be suspended between the 1st January, 1776, and the 21st June, 1784. And we think we tread in the steps of the English judges exactly, when we declare our opinion, that during this period, the presumption of payment of a bond, arising from length of time, should also be suspended. This will necessarily throw out of the calculation 8 years, 5 months, and 21 days.

The length of time, then, *of itself*, is no positive bar in this case; but the circumstances offered being matters of fact, are proper evidence to be left to the jury to decide on the presumption. The impression which the evidence has made on their minds, after a calm and dispassionate consideration of all the circumstances, must determine their verdict.

Verdict for the defendant.

Mr. Levy, for the plaintiffs.

Mr. Thomas, for the defendant.

PIERRE DUCOIGN *vs.* GEORGE CASPER SCHREPPPEL.

A day book is evidence not only of the delivery of goods, but of their prices also, *prima facie*: *aliter* of money lent or cash paid.

INDEBITATUS ASSUMPSIT, for cooper's work, done in St. Domingo for the defendant; the balance claimed being 490 dollars. Pleas, *non assumpsit* and payment.

The plaintiff was sworn to the original entries in his day book; and a contest arose whether these entries were any evidence of the prices of the work.

Per Curiam. We have often heard this point agitated at the bar, and we think with little reason.

We are of opinion that day books are not only evidence of the delivery of goods, but of their prices also, *prima facie*. How else could the prices of broad-cloths, linen, cambric, &c., of different degrees of fineness, be ascertained, after a length of time? A contrary doctrine would render our usage of small advantage to the mercantile or mechanical part of the community.

But the evidence arising from the books does not preclude either party from going into other proof. The matter as to prices is left fully open to disquisition, and the judgment of the jury is to be formed on the whole.

The necessity of the case, however, which gave birth to our practise in this particular, by no means warrants that entries in day books should be considered as evidence of money lent or cash paid. In those instances the necessity does not exist; for the party has it in his power to take notes or receipts, in the ordinary course of dealing.

Verdict for the plaintiff for 490 dollars, and 6 cents costs.

Mr. Du Ponceau, *pro quer.*

Mr. Ingersol, *pro def.*

THOMAS SPEAKMAN *vs.* GEORGE PEARCE.

On a recognizance before a justice of the peace in nature of special bail, the principal cannot be surrendered by the bail after the expiration of six months.

CERTIORARI to Samuel Price, of Delaware county, esq., one of the justices of the peace.

A very regular and formal return was made to the *certiorari*, by which it appeared that after due process issued, judgment had been given by the justice for the plaintiff against one Irwin Armstrong for 6*l.* 15*s.* 7*d.*, a just debt, on the 23d September, 1792; that execution had been respited for six months, on the

said Armstrong entering into recognizance to the plaintiff, with the said Pearce as his security, in the nature of special bail, on condition to deliver the body of the said Armstrong to the sheriff of the county, at, or any time before, the expiration of the said six months, or that the money should be paid.

That after the expiration of the six months, a summons had issued to Pearce, to show cause why he should not pay the debt adjudged, and that Pearce appearing upon the return thereof, and not showing sufficient cause, judgment had been ordered against him.

It was admitted by the counsel that the principal had been surrendered to the sheriff, after the issuing of the summons to show cause, and before the return thereof.

Mr. Thomas, for the plaintiff, remarked that the act of assembly of 5th April, 1785, enlarging the summary jurisdiction of justices of the peace, referred to the act of assembly of 7th March, 1745 (2 Dall. Laws, 305, § 3). Under the latter act (pa. 205), the tenor of the recognizance was pointed out, which minutely agreed with that taken in this cause, and returned by the justice. The condition is, to surrender the body of the principal within the six months, or pay the debt. The security has failed in the first and must submit to the latter. It could not properly be called special bail, because the recognizance must be taken after judgment rendered. In common cases a *ca. sa.* issues to give notice to the bail; but under the act of 1745 the time of surrender is expressly fixed. It is admitted, however, that if the principal should die within the six months, the bail would not be liable, because he has that whole time to surrender him.

Mr. Tilghman for the plaintiff, argued, that the procedure partook of the nature of special bail, and that therefore the surrender before the return of the summons to show cause should excuse the bail, *ex gratia*. In the usual course of practice, if the principal dies after the return of the *ca. sa.*, though before the suing out the *scire facias*, the bail are fixed with the debt and costs. 2 Wils. 67; 2 Lord Raym. 1452. But it is admitted, that under the 10th act, the bail are not fixed until the expiration of the six months; consequently a greater latitude is given to the bail than in common cases. But here the justice does not allow him an equal privilege, as to the time of render.

By the Court. The bail in this case is fixed by the law under

the express terms of his recognizance. He was either to surrender the original debtor in six months, or pay the money adjudged. Though the recognizance is said to be in the *nature* of special bail, it is not to be such in all things. We apprehend this to have been the constant usage under the act of 1745. Let the judgment of the justice be affirmed.

JOHN DORRANCE *vs.* WILLIAM STEWART.

On a promissory note for "lawful money," given at Wyoming in 1778, it shall be intended for so much "lawful money of Connecticut," and be governed by the scale of depreciation of that state.

WRIT of error to the Common Pleas of Luzerne county.

The suit was brought to June term, 1791, on a promissory note, dated 16th June, 1778. The declaration stated it to be for 100*l.* "*lawful money*," meaning "lawful money of the state of Connecticut."

In January term, 1793, the defendant confessed judgment to the plaintiff, reserving liberty to move the Court for their opinion, whether the debt should be reduced by the Pennsylvania or Connecticut scale of depreciation. The point was afterwards moved, and the Court were of opinion that the debt should be calculated by the Connecticut scale, and gave judgment for the plaintiff for 60*l.* 17*s.* 11*d.* damages, and 6*l.* 1*s.* 10*d.* costs.

Upon the record being read, the Court here observed, that the same point had come before M'Kean, C. J., and Yeates, J., at Nisi Prius, at Wilkesbarre, May assizes, 1792, between Burret, administrator of Hibberd, and Spencer, when they were clearly of opinion, in a like case, that the money should be reduced by the Connecticut scale. The term, "lawful money," is almost peculiar to the people of that state, and the import of the words is thoroughly ascertained there. It was a transaction between people who claimed to be citizens of that state, and it is well known that Connecticut exercised jurisdiction at Wyoming several years after the revolution. Luzerne was not erected into a county, by our laws, until the 25th September, 1786. The parties must necessarily have had in contemplation the "lawful money of Connecticut," when the note was given. Proceedings of the Court below affirmed.

Mr. Tilghman, *pro quer.* ; Mr. Thomas, *pro def.*

RESPUBLICA *vs.* MIERS FISHER, Esq.RESPUBLICA *vs.* JOHN F. MIFFLIN, Esq.

An attorney at law has privilege in being exempted from the offices of overseer of the poor, supervisor of the public roads, and constable, but not from arrest or militia duty.

THE defendants were returned respectively as overseers of the poor of the city of Philadelphia, at a city sessions, on the 25th March, 1792, before the mayor, two aldermen of the city, and two justices of the peace of the county of Philadelphia.

The defendants severally appeared, and claimed their privilege as attorneys of this Court and of the Courts of Common Pleas, and as counsel practising in the same Courts, and in the Supreme Court of the United States. The sessions overruled their pleas of privilege, and appointed them respectively to the office of overseers of the poor, but had not imposed their fines for refusal to serve therein when the *certioraris* were taken out.

It was insisted by the defendants that the privilege of officers of justice was the privilege of the Court to which they belonged. 4 Burr. 2109. An attorney is exempt from serving as sheriff of a corporation, though a coporator and resident before and when admitted attorney. *Ib.* He shall not be chosen collector of the lord's rent within a manor when it is copyhold, though it be part of his tenure; nor amerced for not doing his suit at the lord's Court, when his attendance at Westminster is required. 1 Vent. 16, 29. T. Raym. 179. He shall not be appointed bailiff of a corporation. 1 Barnes, 29 (edit. 1754), Richmond's case. An attorney is privileged from being appointed a constable, or being elected into any other office against his will. Cro. Car. 389, 585. Noy, 112. He shall not be made church warden of a parish. 2 Rol. Abr. 272, c. 15. 17 Vin. 508, pl. 1.

If it was deemed necessary in England, for the administration of justice, that the officers of Courts should be vested with certain privileges, the same necessity subsists also here, though not founded on immemorial custom; and it has been held, that a general statute shall not be construed to oust the privilege of the officers of the Courts of justice. Palm. 403.

The bar of Pennsylvania claim not the undue privilege of being exempted from arrests; the general justice of the country should alike pervade all ranks and professions. Nor do they claim exemption from serving in the militia, or paying substitutes in their stead; it is a great *national service*, to which all men are bound equally to contribute. A late case in the Common Pleas at Westminster has put this latter point on a proper footing. 2 Blackst. Rep. 1123, Gerard's case.

Mr. Thomas, for the city, urged that the practitioners of the law cannot rest their pretensions on the ground of usage immemorial, which is the source from whence the attorneys in England derive their exemption; and it would scarcely be tolerated here, should the doctrine of privilege as to attorneys be adopted in the same latitude in which it is received at Westminster. An attorney there cannot be arrested by original process, but only by bill; Doug. 299, 300; nor, according to some authorities, could he be compelled to serve in the militia. 2 Stra. 1143. Cro. Car. 11, 389. 2 Barnes, 33. Heaton's case.

The act of assembly "for the relief of the poor," passed March 9, 1771 (Prov. Laws, 404), made perpetual by the act passed March 25, 1782 (2 Dall. Laws, 20), makes no exceptions in favor of any class of men. Those who are returned by the overseers of the poor going out of office, and shall be nominated by the city sessions, must take on them that burthen, or forfeit 20*l.* for the use of the poor of the city. Pa. 407, § 14. If attorneys had an exemption at common law, they are deprived of it by these acts of the legislature.

The office of an overseer of the poor cannot be compared to that of a constable; the latter may be deemed incompatible with the duties of an attorney, but an attorney may hold the former without injuring himself or his clients. But Gerard's case establishes another important distinction; where the service to which the attorney is appointed is not *personal*, but may be *commuted* for a certain sum (as in this instance, 20*l.*), his privilege does not hold. 2 Bl. Rep. 1130. As a good citizen, he ought to submit cheerfully to the common burthens incident to men of property in the community.

The Court observed that the cases were not regularly before them, no fine having been laid by the city sessions on the defendants for refusing to serve in the office to which they were nominated when the *certioraris* were put in. To settle the question, however, they would not decline giving their sentiments.

The uniform practise of Courts of justice in Pennsylvania has established that attorneys are entitled to privilege. The fourth rule, regulating the practise of the Supreme Court, fully recognizes it. It seems they do not claim an exemption from arrests, or militia duty; indeed, in the former case, we have understood, that a judicial decision many years ago has settled that point, in the case of one John Robinson, an attorney, who claimed such privilege, but it was denied to him on solemn argument. In what, then, can the privilege of the bar consist, unless it be in the exemption from the duties of overseers of the poor, super-

visors of the public roads and highways, constables, and other such inferior offices? It is said an attorney may pursue the line of his profession, and yet sustain the character of overseer of the poor and discharge the duties of that office also. We well know, from the frequent excuses made to us by overseers of the poor, who are summoned as jurymen, that in their idea, both functions cannot properly be discharged by the same person; besides, may it not happen, that the attorney acting *quatenus* overseer, may be called on to advocate on an order of removal, the interests of townships diametrically opposite to those of the city or township which he represents in another capacity? This surely would involve a strange confusion, if not incompatibility of character.

On the whole, we are of opinion, that the privilege of an attorney exempts him from being nominated to the office of an overseer of the poor.

ROBERT ROBB vs. THOMAS M'EWEN.

Court will not appoint auditors under the depreciation act of 3d April, 1781, unless it appears that the contract arose between the 1st January, 1777, and 1st March, 1781.

MR. INGERSOL, for the plaintiff, moved for the appointment of auditors, under the act of assembly of 3d April, 1781, on the affidavit of the plaintiff, that the dispute between the parties was wholly about depreciation, and obtained a rule to show cause.

Mr. Hallowell, for the defendant, now showed cause, and excepted to the affidavit, that it did not state the contract to have arisen between the 1st January, 1777, and the 1st March, 1781, agreeably to the act. He stated that the contract between the parties was dated 27th February, 1775, and produced the original articles of agreement, whereby the plaintiff agreed to convey certain lands to the defendant, in consideration of 360*l.* payable by installments; and that all the moneys were discharged except the last three payments, which he agreed, if due on principles of equity and good conscience, were payable in specie. He also produced several of the cancelled bonds which had been taken up by the defendant; and insisted that the plaintiff's object was, by a reference, to reduce the payments which had been made during the war, and were now finally settled.

The Court strongly inclined against granting the plaintiff's motion; but, on the importunity of Mr. Ingersol, who alleged that he was unprepared to go into a statement of facts in the ab-

sence of his client, the motion was continued by consent, and agreed to be argued before the judges at Nisi Prius, at the next Prius Court, to be held for Huntingdon county.

PETER WIKOFF and ISAAC WIKOFF vs. TENCH COXE, JOHN REED, and STANDISH FORDE.

Where arbitrators or referees under a rule of Court have been guilty of gross injustice, or have made a plain mistake, the Court will interpose; but the injustice or error must be clearly and satisfactorily proved.

SUPREME COURT, January Term, 1793.

Philadelphia County, ss:

THE DECLARATION.—Tench Coxe, John Reed, and Standish Forde, late of the county aforesaid, merchants, were attached to answer Peter Wikoff and Isaac Wikoff, of a plea of trespass on the case, &c.; and thereupon the said P. and J., by Jared Ingersol, their attorney, complain and say, that on the 1st day of January, Anno Domini, 1788, at the city of Philadelphia, in the county aforesaid, a certain dispute was subsisting between the said P. and J. on the one part, and the said T. J. and S. assignees of Isaac Sidman, an insolvent debtor, and trustees for the creditors of the said I. S., to compromise and determine which, as well the said P. and J. as the said T. J. and S. put themselves upon the arbitration of Andrew Bunner, William Pollard, and Peter W. Gallaudet, arbitrators, indifferently chosen between them, to award, order, and adjudge of and concerning the said dispute; in consideration whereof, and in consideration that the said P. and J. had undertaken and promised to the said T. J. and S. to perform and fulfil the award of the said arbitrators on their part, the said T. J. and S. on the 20th day of June, Anno Domini 1788, at the county aforesaid, undertook, and to the said P. and J. faithfully promised to perform and fulfil the award of the said arbitrators on their part; and the said P. and J. in fact say, that the said arbitrators having taken upon themselves the burden of the said arbitration, afterwards; to-wit: on the 30th day of June, in the year last aforesaid, at the county aforesaid, awarded, ordered, and adjudged, of and concerning the same premises, in form following; to-wit: We the subscribers, arbitrators, appointed by P. and I. W. on the one part, and T. C. J. R. and S. F. assignees of I. S. on the other part, to settle the accounts, and ascertain the balance between the said P. and I. W. and J. S., having examined the accounts and vouchers, and heard the allegations of the parties, are of opinion that the balance of 3400*l.* 16*s.* 6½*d.* was due from the said I. S. to the said P. and I. W. on the 2d November, 1782, including interest, the said P. and I. W.

have since paid for the said I. S. to Nathaniel Tracy, and that the certificates in the hands of the said P. and I. W. do remain their property, having charged them with the amount. The private account of Isaac Wikoff respecting the first cost and proceeds of the adventure, per brig Schuylkill, is not taken notice of in this settlement; whereby the said P. and I. W. become entitled to have and receive from the said T. J. and S. the sum of 566*l.* 13*s.* 4*d.* being the rate of dividend upon the sum received by the said T. J. and S. of the effects of the said I. S. which the creditors of the said I. S. had agreed to distribute among themselves, and which the creditors of the said I. S. did receive, except the said P. and I. W.; and the said P. and I. W. in fact say, that although they were ready on their part to perform the award of the said arbitrators, yet the said T. J. and S., their promises and assumptions aforesaid, in form aforesaid made, not regarding, but contriving and fraudulently intending the said P. and I. W. in this behalf, craftily and subtly to deceive and defraud, the said sum of 566*l.* 13*s.* 4*d.* awarded to the said P. and I., in manner aforesaid, by the referees aforesaid, have not paid, nor hath any of them paid to the said P. and I. W. or either of them, although to pay the same the said T. J. and S., on the 1st day of January, Anno Domini, 1789, and often afterwards at the county aforesaid, by the said P. and I. were required. [Then followed a second general count for 566*l.* 13*s.* 4*d.* for money had and received by the defendants to the use of the plaintiffs.]

To the damage of the said P. and I. W. 6800*l.* and thereupon they bring suit, &c. Pledges, &c.

Special pleas to the first count.—And now here at this day, to-wit, on Wednesday, the eighth day of December, Anno Domini 1790, of the term of December, until which day the said T. J. and S. had leave to imparle, and then to answer, &c. before the justices of the said Court, came as well the said P. and I. W. by J. I., their attorney aforesaid, as the said T. J. and S., by John D. Coxe, their attorney, and the said T. J. and S. defend the force and injury, when, &c. and say that the said P. and I. ought not to have and maintain their said action against them, because they say that true it is that they did submit themselves to stand to the award of the said A. B., W. P., and P. W. G., arbitrators aforesaid, and that they the said T. J. and S. did undertake to perform and fulfil what the said arbitrators should adjudge on their part to be performed, as in the declaration aforesaid is alleged, but that the said I. S., on the 9th day of November, Anno Domini 1782, at the county aforesaid, did, by a cer-

tain writing of assignment, sealed with the seal of the said I., and to the Court now here shown, whose date is the same day and year aforesaid, assign all his estate, real, personal, and mixed, unto the said T. J. and S., their heirs, executors, administrators, and assigns, in trust, for the use of all his creditors, in equal shares and proportions, according to their respective demands, without any preference to one more than another; and the said I. S. was then and there indebted to the said P. and I. W., in a certain sum of money. And the said T. J. and S. further say, that before the submission, and the said promise of the said T. J. and S. made, and before the arbitrators made any award between them and the said P. and I. W., the said P. and I. being partners in trade, and the said P. and I. W., and the said I. S. and a certain Jonathan Smith being partners in other trade, they, the said P. and I., partners aforesaid, as first mentioned, on the 31st day of August, *Anno Domini* 1779, at the county aforesaid, took out of the partnership store of the said P. and I. W., I. S., and J. S., certain certificates, bearing interest on France, to the amount of 11,800 dollars, which certificates were then and there the joint property of the said P. and I. W., I. S., and J. S., for which they, the said P. and I. W., then and there gave a receipt in writing, and which certificates they had in hand and undisposed of at the time of making the said award; by reason whereof, and of the said writing of assignment, the said T. J. and S., assignees aforesaid, were entitled to demand and receive of the said P. and I. W., the said certificates, as the proper goods and chattels of the said I. S., or the value of his interest therein, all which the said T. J. and S. did make appear to the said arbitrators at and before the making their said award, and did then and there request the said arbitrators to allow the full value thereof to the said I. S., in account with the said P. and I. W., yet the said arbitrators did not allow the said full value as aforesaid, in account as aforesaid, and this, the said T. J. and S. are ready to verify. Wherefore they pray judgment, whether the said P. and I. W. ought to have and maintain their said action upon the said award, made in manner and form aforesaid, against them, the said T. J. and S.

And the said T. J. and S., with leave of the Court, further say, that the said arbitrators, on the 30th day of June, *Anno Domini* 1788, at the county aforesaid, by the said award, did order and award that the said certificates should remain the property of the said P. and I. W., they, the said arbitrators having charged them with the amount thereof; yet the said T. J. and S. in fact say that the said arbitrators have not charged the

said P. and I. W., with the amount thereof, which the said T. J. and S. are ready to verify. Wherefore they pray judgment, &c.

And further, the said T. J. and S., with leave of the Court, plead *non assumpserunt* and payment.

The plaintiffs demurred generally to the special pleas, and replied *non solverunt* to the last pleas.

The defendants joined in demurrer.

Mr. Ingersol, in support of the demurrer, observed that the amount of the special pleas to the first count in the declaration, was that the plaintiffs had taken out of the partnership stock, certificates to the amount of 11,800 dollars, and that the arbitrators had awarded that these certificates should be their property, but had not charged them with the true value thereof. It must be obvious that the certificates ought only to be charged according to the real price they were at when the plaintiffs appropriated them to their own use, in the same manner as if they had taken cloths, linen, &c., out of the partnership stock. They should be debited with the then current prices, and not with what they might be sold for according to subsequent events, as war, or a scarcity of the articles. The objection is not well founded; but it goes in fact to the judgment of the referees, and the defendants' object is to overhaul what they have done, and set all matters again afloat. This we deem inadmissible by the rules of law. The general demurrer confesses only matters of fact well pleaded. Plo. Com. 13, b. 85, a; Co. Lit. 72, a; 5 Com. Dig. 138.

The Court always leans in favor of awards, and will not examine into the merits of the cause. Awards are now liberally construed. 1 Burr. 277. Courts will not travel into them. 2 Burr. 701. When the parties themselves choose their own judges, equity will not relieve against the award, unless it be in case of corruption, exceeding authority, and the like. 1 Equ. Ca. Ab. 50, pl. 1. At law, partiality in arbitrators cannot be given in evidence on *nil debet*. 2 Wils. 149.

In the case of *Wade vs. Gallagher*, on an exception to an award of referees, in September term, 1791, the Court refused to examine the referees as to the kind of continental money tendered, how or when the tender was made, or what evidence there was before them respecting it. It must be confessed that was a hard case, as the tender of continental money was set up against a fair debt.

Messrs. Coxe and Rawle for the defendants. It appears by the declaration, that the defendants were assignees of Isaac

Sidman, an insolvent debtor, and trustees for his creditors. The time of the assignment is set out in the special pleas to be on the 9th November, 1782, and this is admitted by the demurrer. The arbitrators have stated a sum due to the plaintiffs on the 2d November, 1792, including interest afterwards paid by them. Now if they were restricted to find a balance due at a fixed day, they ought not to have taken in any interest money paid afterwards. They would thereby exceed their authority. If they were not so restricted, the case is precisely that in Dall. 119. Report of referees that "75*l.* was due on the 3d March last, with interest on the same," set aside for uncertainty; because there might have been a sum then due, and yet nothing due at the time of making the report.

To this it was replied, by Mr. Ingersol, that the submission was evidently to ascertain the debt due to the plaintiffs on their joint dealings at the time of the assignment. The 2d November, 1782, was the date of their last partnership transaction; but the plaintiffs having joined in an obligation as sureties for Sidman to Thatcher, the interest was then due, and ought to have been included, though not actually paid until a subsequent period. And of that opinion was the Court.

The defendant's counsel proceeded. If the strict rules of the common law, laid down by the plaintiff's counsel, are inflexibly to prevail in Pennsylvania, manifest injustice will frequently result from them. We have often been told, in this Court, that *equity* forms part of our law. We have no chancery jurisdiction amongst us, and unless the absolutely necessary part of that jurisdiction is exercised by the ordinary tribunals of justice, great inconveniences must arise. In England, when there is a palpable mistake by an arbitrator, or miscalculation in an account that had been laid before him, the party may bring his bill to have it rectified. 3 Atky. 644. An award is conclusive to the parties until an error is shown in taking the account. One is not concluded from proving an error in an award, if he has evidence that will amount to it. Ib. 530.

If it appears that arbitrators have gone on a plain mistake, either as to law or fact, the same is an error appearing in the body of the award, and sufficient to set it aside. 2 Vern. 705. It surely will not be insisted, that the resolution in 2 Wils. 149, that the partiality of arbitrators shall not be shown in evidence on *nil debet*, is applicable here. Property would be precarious, indeed, under such a principle. Referees would be the sole, unlimited, uncontrolled judges in this state. In a case of the most

manifest injustice, will not the Court interpose its authority? Will they suffer an award to be executed — nay, will they lend their aid to carry an unrighteous award into execution, when the injured party can, beyond all question, establish its flagrant deviation from right? If in any case, however strong, a Court will think themselves bound to interfere, then the principle we labor for is admitted.

By the Court. Unquestionably, equity is a part of the law. Dall. 213. And a necessity frequently occurs, in order to prevent a failure of justice, of letting the parties into proof unknown to the rules of the common law. . Dall. 17.

We have no Court of Chancery. Hence, in a variety of instances, we have adopted their maxims. The late constitution of the state justifies this practise by the 6th section of the 5th article, under the words, “beside the powers heretofore usually exercised” by the Supreme Court and the several Courts of Common Pleas.

Suppose, in a matter of trover, where the object in controversy was confessedly of the value of 10*l.* only, referees should give 500*l.* or 1000*l.* damages to the plaintiff; or, upon an account in which a sum was found due by them, it should evidently appear, by inspection, that there was a miscasting up of the amount of 100*l.*, more or less, than the real sum, and that the referees proceeded on that plain mistake, would not the Court interpose their superintending powers (whether the submission was with or without a rule of Court), and thereby prevent manifest injustice? Could our minds, while sitting on this bench, be at rest, unless we pursued such a line of conduct? The honest part of mankind will certainly answer in the negative.

The general rules respecting awards are well known (Vide Dall. 173, 314, 486). But they imply exceptions. As we observed in *Wade vs. Gallagher*, already cited, “Every case must be governed by its own peculiar circumstances. You may investigate an award as to a plain, simple fact; as, did the referees allow interest on an unsettled account, or the like. But to go further would supersede the use of all references.”

It is now become a considerable part of the business of the Superior Courts of justice to set aside awards when partially or illegally made. 3 Black. Com. 17. And it appears, from the cases cited by the defendants, that equity would relieve when there has been a plain mistake. A power of control must be lodged in the Courts of justice here, to be exercised with legal discretion in all cases of exceptionable awards. Let the mistake, therefore, be pointed out and proved.

For the defendants. This case differs from common awards. It is special, and refers to another paper, wherein the arbitrators are said to charge the plaintiffs with the amount of the certificates. The account referred to, showing their mode of calculation, must be considered as part of the award itself. A charter having reference to other charters, it is the same as if all had been recited. 9 Co. 30 *a*. If the Quarter Sessions set forth the reason of their order, the Superior Court will revise the same. Cas. temp. Hardw. 381.

This account we submit to the Court. The defendants are charged therein with continental money, at the rate of 40 for 1, when in many instances the money was much more considerably depreciated; and the plaintiffs are not debited therein with the certificates at the value they possessed in June, 1788, when the award was made. The arbitrators, therefore, have gone on mistaken principles, in calculating the depreciation, and the case of *Pringle vs. M'Clenachan* (Dall. 486), is extremely parallel to that before the Court. It is unfortunate for us, that the arbitrators cannot recollect the transaction sufficiently to throw further light on the matter.

Mr. William Pollard, one of the arbitrators, was in Court, but declared the grounds on which he had proceeded had wholly escaped his memory. He was fully satisfied of the justice of the award when he agreed to it.

By the Court. To justify us in examining into the merits of an award, it is incumbent on the party who excepts to it, to produce the most clear and satisfactory proof of the errors he points out. No persons would otherwise act as arbitrators, and the utility of references would be wholly destroyed. It is of no moment at what rate the continental money is debited, provided the same rule is applied to both parties, and they have taken out equal sums at the same times. This rather appears to the Court to be the case on the face of the account exhibited.

As to the charge of the certificates against the plaintiffs, the answer given by their counsel hereto, in the outset of their argument, is abundantly sufficient to our minds. It does not clearly appear to us that any injustice has been done, and therefore the defendants having failed in their proof, the plaintiffs are entitled to enter judgment.

PRESIDENT AND DIRECTORS OF THE COMPANY OF THE BANK OF
NORTH AMERICA *vs.* PETER BARRIERE.

When a promissory note has been indorsed, after it *became due*, it amounts to an original undertaking as a note newly drawn by the indorser.

THIS cause was tried at the last January term, when a verdict was agreed to be taken for the plaintiffs for 1560*l.* the principal and interest appearing due on the face of a promissory note, subject to the opinion of the Court on the following case.

On the 25th November, 1784, John M'Cree, as servant of Haym Soloman, and duly impowered for that purpose, drew a promissory note for 2,600 dollars, payable in 45 days, to Don Francisco Rendon or order, which Rendon indorsed in blank, and received the amount from the plaintiffs, deducting the discount. The note, which became due on the 9th, January, 1785, was dishonored by Solomon, and due demand was made of him and notice thereof duly given to Rendon, the indorser. It was afterwards protested on the 13th of January following.

Rendon, the payee of the note, being about to leave the continent of America and sail for Europe, came to the bank of North America, accompanied by the defendant, on the 2d December, 1786, when the cashier of the bank produced to them the note, and an account of the sum due thereon. Both Rendon and the defendant approved of the same, and the defendant indorsed his name on the note, to give it credit. No demand was made on Solomon in his life time, or on his administrators after his decease, subsequent to the time of the defendant's indorsement; nor was any notice given to Rendon or the defendant of non-payment, subsequent to such indorsement, until some short time before the action brought.

If, on these facts, the opinion of the Court should be in favor of the plaintiffs, it was agreed that the sum due to the plaintiffs should be ascertained by reference or an issue; if in favor of the defendant, then the verdict was to be set aside and judgment entered for the defendant.

The case was now argued by Messrs. Du Ponceau and Thomas, for the defendant, and by Messrs. Lewis and Tilghman, for the plaintiffs.

On the part of the defendant, it was said, that the plaintiffs had not founded their suit on a collateral contract, but had charged the defendant as an indorser, on general legal principles. The declaration states two counts. 1st, that Solomon drew the note through the instrumentality of M'Cree, payable to Rendon

or order, on 25th November, 1784, that Rendon, on the same day, indorsed it to the defendant, who on the same day indorsed it to the plaintiffs; that on the 13th January, 1785, demand was made of Soloman, who refused payment, and notice thereof was afterwards given to the defendant, who in consequence thereof becoming chargeable, promised to pay, &c. 2d, that Soloman, on the 25th November, 1784, drew the note payable to Rendon, or order; that Rendon, on the same day, indorsed it to the defendant, who on the 2d December, 1786, indorsed it to the plaintiffs; that notice was afterwards given to Soloman hereof, and a demand of payment of him, and his refusal; that notice thereof was afterwards given to the defendant, who in consequence of the premises becoming chargeable, promised to pay, &c.

Neither the proof at the trial, nor the case as stated, warrants the conclusion that the indorsement was made and delivered by Rendon to the defendant, as laid in both counts. The demand on Soloman, as laid down in the second count, after the 2d December, 1786, or notice given to Rendon, or the defendant, subsequent to his indorsement, is not admitted by the case. It is obvious then that the declaration states facts which do not exist, and the *allegata* and *probata* do not agree; consequently, on the face of the record, the plaintiffs are not entitled to recover. If they choose hereafter to bring special *assumpsit*, founded on any supposed engagement of the defendant at the time of his indorsement, they must bring their suit accordingly, and so declare.

The defendant's indorsement of the note operated only as an order to Soloman to pay the contents to the plaintiffs; Soloman was bound to pay on demand, and on his refusal and notice given thereof to the defendant, in convenient time, a cause of action against him arose. The plaintiffs could only have marked above the blank indorsement of the defendant, either a receipt or an order to pay the contents to other persons.

The contract on the 2d December, 1786, amounted to a new note, drawn by Rendon, indorsed by the defendant. This appears from the expressions of Justice Buller, in 3 Term Rep. 83. To raise a charge, therefore, against the defendant, a subsequent demand should be made on Rendon. But no such subsequent demand, it is admitted, was made, either on him or Soloman. Promissory notes assume the shape of bills of exchange only when indorsed; and the indorsee must first make his demand against the maker of the note, and on his default only can have recourse to the indorser. 2 Burr. 676. The indorser is conditionally liable. Demand must be made of the drawer, and notice must be proved to have been given to the indorser of the

drawer's default, before the indorser can be charged. 2 Stra. 1087; Levelass on Bills, 40; Bayley, 17, 28; 1 Wils. 48; 1 Espin. 35 (London edit. 32). A demand of the drawer of a note, and notice to this effect to the indorser, are absolutely necessary to be laid in the declaration by the indorsee against the indorser. Doug. 654. Notice to an indorser means something more than knowledge, because it is competent to the holder to give credit to the maker. Per Ashurst, 1 Term Rep. 169.

The indorser is chargeable only in a secondary degree, and to render him liable, you must show that the holder looked to him for payment, and gave him notice that he did so. Per Buller, Ib. 170.

The protest before the 2d December, 1786, cannot affect the defendant. After his indorsement, the note might be considered as payable on demand; and in this light he only became chargeable after application made to Soloman, and notice thereof given to the defendant.

E contra, it was urged for the plaintiffs that the bookes of entries furnished no other precedents than those pursued in the present declaration, in order to charge an indorser. Rendon's indorsement having been in blank, the plaintiffs were at liberty to apply it as they pleased. To effectuate the intention of the parties, Rendon had been considered as the indorser to the defendant, who lent his name to give a credit to the note; which certainly was allowable. An acceptance to pay a bill of exchange, according to its tenor, made after the time appointed for its payment, is a general acceptance to pay it on demand. 1 Ld. Ray. 364.

The objection was taken therein that the promise was void, because impossible to be performed, the day of payment being past at the time of the acceptance of the bill, and so impossible to be performed *secundum tenorem et effectum billæ prædictæ*, all which appeared upon the plaintiff's declaration. But the Court held that it would amount to a promise to pay generally. Ib. The indorsement of a bill after the day of payment is very common and usual, and a very good practise. Ib. 575. Bayl. 16, 17. 1 Show. 163.

The defendant's counsel had certainly mistaken the meaning of Mr. Justice Buller. The words he uses in 3 Term Rep. 83, are: "When the note has been indorsed after it became due, I consider it as a note newly drawn *by the person indorsing it*." The indorsement of a note after the day of payment past, cannot be considered as a warranty for the drawer's performing his contract. It would be morally impossible that he should perform it. The substance of the indorsement would operate as an

engagement to become the principal debtor, and be accountable for the money. Indorsement on a blank note or bill is an engagement and letter of credit to an indefinite sum. Doug. 496.

M'Kean, C. J. I have taken time to deliberate on this matter, my brethren being stockholders of the North American Bank, and declining on that account to give any opinion.

The declaration is good in substance. The opinion of Buller, cited from 3 Term Rep. 83, goes the whole length of this case. Adjudications in England, since the revolution, are not equally binding on us as those previous to our declaration of independence. But where they are founded on sound principles of law, general convenience applicable to our local situation and good sense, they will have weight. Every indorsement of a bill of exchange is considered as a new bill. After the day of payment in a note has expired, the indorser cannot be looked on otherwise than as a new drawer. The defendant here cannot be supposed to give a warranty for Rendon, who was then about to leave the continent and sail for Europe. This would be an absurd notion. The parties must necessarily have meant something else; and it is obvious that the defendant's indorsement must have been considered as an original undertaking, to become responsible for the amount of the principal and interest. It certainly must have been so understood at the time by all the parties; and the substantial justice of the case demands that I should pronounce

Judgment for the plaintiff.

THOMAS M'INTYRE, and ISABELLA, his wife, late ISABELLA NEILL,
JOSEPH DONALDSON, THOMAS NEILL, and HERCULES COURTNEY,
executors of WM. NEILL, *vs.* HENRY CUNNINGHAM.

It is no ground for a new trial that the judge who tried the cause thought that the evidence preponderated for one party when the jury found for the other party.

MOTION for a new trial.

Mr. Justice Shippen now reported the evidence, which appeared before him and Mr. Justice Bradford on the trial at Carlisle, on the 14th May last, as follows: —

The suit was a *scire facias* upon a judgment obtained in the Common Pleas of Cumberland county, in October term, 1775, by the plaintiff's testator against the defendant. Mr. James Wilson appeared on the docket as attorney of the plaintiff, on which there was an entry, in July, 1779, of "debt and costs paid."

The defendant, under his plea of payment to the *scire facias*, produced the receipt of Mr. George Noarth for 463*l. 8s. 2d.* in full of debt and costs at the foot or on the back of the *plaintiff's account*, signed "George Noarth for Jas. Wilson, attorney for plaintiff," dated 24th October, 1779. The plaintiffs did not contend but that George Noarth had received the money. The principal question was, whether a payment to Noarth was a payment to the plaintiff?

Noarth was, at the time of giving the receipt, a practising attorney of the Court of Common Pleas of Cumberland county. The defendant contended that Mr. Wilson, the plaintiff's attorney, having at that time left off the practise in that county, had put his business into the hands of Noarth, and that, in the course of his doing that business, he had received this debt.

The proof on the part of the defendant arose in part from the deposition of Mr. Justice Yeates, who swore that after January term, 1779, George Noarth was a practising attorney residing in Carlisle, and had the custody of Mr. Wilson's papers; and John Glen further swore that Noarth lodged in his house at Carlisle for two months, and was possessed of a key to a box of Mr. Wilson's in the house of John Agnew, esq.; that upon a particular occasion he went to Agnew's with Noarth, who, after searching some time, took out a bond which he wanted.

On the part of the plaintiffs, it was contended that Noarth was not the attorney of the testator; he had no authority, either from him or Mr. Wilson, to receive the money; even Mr. Wilson himself would have had no authority to receive the money after such a length of time, it being four years after the judgment, and when the continental money had depreciated 30 for 1.

The evidence on which the plaintiffs chiefly relied was the deposition of John Agnew aforesaid, who swore that when Mr. Wilson left the Cumberland Court, he left his papers in a box in the deponent's custody, with directions when he gave out the papers, to take receipts; that he never delivered to Noarth any account of Neill against Cunningham, as he believed, nor ever received any written or other order from Mr. Wilson to deliver Noarth any of his papers. Mr. Wilson's directions did not prevent the attorneys of the Court from having access to the papers, and that the deponent had since delivered the box containing the papers to Thomas Smith, esq.

Upon this evidence, and the arguments of counsel, the Court left it to the jury to say whether Noarth had any authority to receive the money; they suggested that as Noarth was certainly *not obliged* to receive it, there might possibly have been some

collusion between him and the defendant. The jury, however, found for the defendant.

Mr. Ingersol, for the plaintiffs, insisted that great injustice had been done by the verdict. A re-examination was only asked for. The box of papers had always remained in Mr. Agnew's possession, until he delivered it over to Judge Smith. This shows clearly, that Mr. Wilson had given no power to Noarth to transact his business; but if he even had, it is a maxim that *delegata potestas non potest delegari*. 2 Inst. 597. Noarth had died insolvent, and Mr. Wilson would become chargeable to the plaintiffs for the debt, if judgment was rendered on the verdict.

Mr. Tilghman, for the defendant admitted, that the payment of continental money in October, 1779, was certainly a hard case, but contended that what the jury had done was perfectly right, under the evidence before them, and all the circumstances.

The plaintiffs had experienced an evil, incident to the late war, to which no human wisdom could prescribe a full remedy. The fact was fairly left by the Court to the jury.

Per Curiam. Both parties gave evidence to the jury, on the points by them respectively contended for, and it was wholly submitted, by the judges who tried the cause, to the jury for their decision. It was left to them on the points, whether Mr. Noarth acted under a general authority from Mr. Wilson, or had intruded himself into the business, and whether he had been guilty of any collusion with the defendant. The jurors may themselves have known many facts respecting Mr. Noarth's transaction of Mr. Wilson's former business, and from thence inferred the delegation of an authority to him. The matter had been long pending, and to have required full proof of an authority from Mr. Wilson, after so many years elapsed, would have been highly unreasonable. Nor should it be forgotten, that if an attorney had refused to receive continental money for his clients in Cumberland county, in October, 1776, he would have been refused the liberty of practising in that character. It is no reason to grant a new trial that the judges who tried the cause thought that the evidence preponderated in favor of the plaintiffs, and summed up the evidence rather in that way. The rule to show cause why a new trial should not be granted must be discharged, and judgment entered for the defendant.

[Vid. 1 Cha. Ca. 95, 96; 1 Term Rep. 710; Doug. 600; 4 Term Rep. 120; Cambell's lessee *vs.* Sproat et. al.]

proved, that the aforesaid John Myer had often declared, in his hearing, that the canal should never pass through his lands; and that there was a general combination of the defendants against the work itself, which he superintended as engineer.

By the Court. It would be to little purpose to offer terms of agreement respecting the lands to persons combined in a body against the work itself. To what end should Myer be applied to, who has often said of the canal should not go through his lands, unless to experience insult; the other defendants, by striking the jury, and all of them by showing their lines and making preparations for the coming of the jury, evidently showed that they evaded any other terms than those which a jury should make; and they, by their conduct, have waived and relinquished their claim to any overtures on the part of the plaintiffs respecting an agreement for the property.

There is no objection made to what the jury have done on the ground of substantial injustice, and the exception taken appears captious; wherefore, let the inquisitions be confirmed, and judgments entered thereon agreeably to the law, unless other cause be shown.

Mr. W. M. Smith, *pro quer.*

Messrs. Montgomery and J. B. M'Kean, *pro def.*

RESPUBLICA *vs.* THE GAOLER OF PHILADELPHIA COUNTY.

Free negroes or mulattoes can be bound here as servants until twenty-one years of age, but no longer; but those who have been bound in other states and brought into this state, may be compellable to serve until twenty-eight years old, according to the terms of their indentures.

To a *habeas corpus* under the act of 1785, returnable forthwith, to bring before the Court the body of negro Robert, Mrs. Mary Weed, the gaoler, made return that the said negro, Robert, was detained by her under a commitment of Hilary Baker, esq., one of the aldermen of the city of Philadelphia, as the runaway servant of Anne Tharp, the widow of William Tharp, late of the said city, deceased.

It was admitted that he was brought into this state in 1779, as a slave for life, was not registered according to the directions of the act, "for the gradual abolition of slavery," passed on the 1st March, 1780, and had lived with the said William Tharp; that, on the 17th August, 1784, he was bound, by indenture, by the guardians of the poor of the said city, to the said William, as a servant, to serve him from the age of fourteen years to the age of twenty-eight years, and that the said negro was now of full age.

Messrs. Lewis and Coxe, for the negro, contended that the indenture was not good in law, and that his servitude expired when he arrived at the age of twenty-one years. By the 5th and 10th sections of the abolition act, he became free, not being registered within the time prescribed therein (Dall. 472 to 479), and therefore could only be bound as a white person, to-wit: until twenty-one years of age; if a female, until the age of eighteen. The 4th section of the act respects negro and mulatto children, born within the state, after the passing of the law, but in no wise relates to persons then born and not registered. It is true, the expressions in the 13th section are general, but it must be considered that the words are in the *negative*, and not *affirmative*. And they must be explained by the preceding section, which confines them to the cases of negroes and mulattoes introduced into the state, under covenant to serve for long and unreasonable terms of years.

Per Curiam. We are unanimously of opinion that the clear intention of the legislature, shown in the 12th section of the abolition act, will control the operation of the general words used in the succeeding clause; and that in the cases of *free* negroes, or mulattoes (for want of being registered by manumission, or otherwise), born either before or after the passing of the act, they can be only bound until twenty-one years of age. The 13th section was enacted to prevent the evils which would result from attempts to evade the spirit of the law, by importing negro or mulatto servants into the state, for long terms of years. But negroes or mulattoes, *bound in other states*, to serve until twenty-eight years old, whose indentures have been executed to liberate them from a longer servitude, or from slavery, and *brought into this state*, may be holden as servants, according to their indentures, under the express words and meaning of the act. And such, for many years, has been the uniform construction of the law.

Negro Robert must, therefore, be discharged.

RESPUBLICA vs. JAMES BURNS, esq.

Information lies against a justice of the peace for taking the recognizance of a person charged with an assault and battery, himself in 30s., and two sureties in 15s each.

ONE John Montgomery, jr., attorney at law, of Carlisle, had been indicted in Mifflin county, for an assault and battery, under very aggravated circumstances, and escaped into Maryland. The governor of this state had demanded him from the executive authority of Maryland, under the 4th article of the constitution of the United States, and he was sent up, accordingly, to Mifflin county. He appeared before the defendant, a justice of the peace, of the said county, and entered before him into recognizance, himself in the sum of 30s., and two sureties in 15s. each, conditioned for his appearance at the then next Mifflin Quarter Sessions of the peace, to answer the indictment and abide the judgment of the Court in the premises. And Burns gave Montgomery a certificate that he had entered into recognizance with *sufficient securities* to appear and answer; whereupon Montgomery was discharged.

A rule had been granted to show cause why an information should not be filed against the defendant for this misdemeanor.

Mr. Morgan now showed cause and contended that the defendant had not been influenced by corrupt motives. He read the affidavits of George Wilson and John Culbertson, the two sureties of Montgomery, to prove it. The former swore that Montgomery had told Burns he had accommodated the dispute, and that a small sum would be sufficient to take the recognizance in. Burns at first hesitated, but afterwards agreed to take a small sum; and there did not appear to the witness any collusion between Burns and Montgomery. The latter swore nearly the same things, except that he heard nothing said about the dispute being accommodated. Burns remarked at the time that the bail was small, but he supposed it would make no odds.

Per Curiam. We cannot dispense with a public examination of the present charge, under the circumstances which appear before us. It is of the utmost consequence to society, that the proceedings of magistrates should appear pure in the eyes of the world. Their intentions should not admit of suspicion. The defendant has not purged himself on oath. If the matter originally in variance had been compromised, there was no necessity to take a recognizance. Burns could not have been so ignorant as not to have known that the taking of recognizances in such sums was a reproach to the public justice of the country,

on a criminal charge. The certificate that Montgomery had entered into recognizance with *sufficient* securities, proves that he knew he was acting wrong in his office. Let him exculpate himself on a public trial. His character as a justice of the peace demands it.

The rule for granting an information must be made absolute.

NICHOLAS PORTIER *vs.* PETER LE ROY.

A French subject, who has taken the oath of allegiance to the United States, is not within the 12th article of the convention between America and France, dated 14th November, 1778.

MR. MOYLAN, for the defendant, moved under the 12th article of the convention between the United States of America and France, dated 14th November, 1778, that the suit should be discharged, alleging that the same was between two subjects of France.

To which Mr. Tilghman, for the plaintiff, answered by denying the fact, and showed that his client had taken the oath of allegiance to the United States in the Court of Common Pleas for the county of Philadelphia, on the 17th February, 1794.

It was then urged by the defendant on another ground, that the matter in controversy between the parties had previously been under consular jurisdiction, and had been heard before two French consuls, M. Dupont and M. Cassine. But this not appearing to be the case, by the certificate or record produced, the motion was dropped. Bail was ordered in 300%. on hearing the cause of action.

PIERRE BERTRANDT *vs.* ESPRIT GAUTIER FILS.

In a suit between two French subjects, though the consul of France has given his decree in favor of the plaintiff, the Court will not hold to special bail.

THIS was a question between two French subjects, refugees from the island of St. Domingo.

The defendant had been discharged on common bail on a hearing before Mr. Justice Shippen, and the plaintiff had appealed to the Court.

It is alleged that the French consul had given his decree in favor of the plaintiff, and unless the Court would hold the defendant to bail, the plaintiff could derive no benefit therefrom.

E contra it was said, that the Circuit Court of the United States had uniformly refused to receive jurisdiction of suits and

differences between subjects of France, under the 12th article of the convention. And the same point had been determined in the Superior Court of Massachusetts.

Per Curiam. Treaties are the supreme law of the land, and we must strictly adhere to the convention, which precludes us from jurisdiction in such a case. If the French consul has no power to enforce his own decree, the Minister of France can readily remedy the defect by negotiation, and agreeing on an additional article with the executive authority of the United States.

Motion denied.

JAMES GOODRIGHT, lessee of WILLIAM M'CAUSLAND, jr., GEORGE M'CAUSLAND, THOMAS M'CAUSLAND, ANNE M'CAUSLAND, ESTHER SCOTT, JANE SCOTT, *vs.* WILLIAM M'CAUSLAND, sr., and JAMES CRAWFORD.

Where the matter of fact has been left to the decision of the jury, the Court will not grant a new trial; nor where a juror has betted on both sides of the cause, unless it produced an evident bias; nor where some of them have expressed their sentiments on the opening of the cause. The proof of jurors eating and drinking at the expense of the party for whom the verdict has gone must be clear and full, and must establish undue management or criminal intention of the party, before the verdict will be set aside.

MOTION for a new trial on the part of the defendants, on a rule to show cause, had been granted.

The action had been tried at Lancaster the last October assizes, before M'Kean, C. J., and Yeates, J., and a verdict had passed for the plaintiff.

The new trial had been pressed on five grounds:—

1st. That the verdict was against the weight of evidence.

2d. That Herman Skiles, one of the jurors, some weeks before the trial, had betted a pint of wine with Colonel James Mercer, that a verdict would go for the plaintiff, and thereby showed his partiality.

3d. That five of the jurors eat or drank during the trial at the expense of one of the lessors of the plaintiff.

4th. That two of the jurors declared their opinion in favor of the plaintiff before they heard the testimony.

5th. That Herman Skiles aforesaid, and two others of the jurors, threatened to throw three others of the jury, who dissented from them in opinion, out of the window of the second story of the Court House, where they were deliberating on their verdict, unless they would agree to find a verdict for the plaintiff.

Affidavits were agreed to be mutually taken on both sides upon a cross examination of the witnesses, to be read in evidence at the argument; and three witnesses were examined *viva voce* in Court.

The result of the testimony arising therefrom was as follows:

On the second ground: Skiles did bet a pint of wine with Mercer, two or three weeks before the trial, that the plaintiff would gain the cause, before he was struck as a juror. He also, several times, expressed himself that the defendants would lose the action, and this did not come to their knowledge till the jury were sworn. On the other hand, it was proved that Skiles had expressed himself differently at other times, and offered to bet 2 to 1 against the plaintiff's success. He actually did lay a gallon of wine with one person, and one half pint with another, that the plaintiff would miscarry. When Mercer paid the bet, Skiles did not recollect that he had laid it.

On the third ground: Several of the jurors drank in company with William M'Causeland, jun. during the trial, which continued five days, and one of the jurors eat with him; but it did not appear that any private conversation took place between them, or any observations made respecting the merits of the cause, nor was the drinking or eating proved to be at his expense. Several of the plaintiff's witnesses lodged at the same inn with some of the jurors, and the aforesaid William visiting those houses occasionally, fell into company with the jurors, and they severally called for pints of wine, of which the whole company drank, but each paid for his pint, as his club of the liquors introduced. It was sworn by Michael Rhine, however, that the aforesaid William, after the first motion made for the new trial, had said to him, that no one but himself could prove the fact of his treating the jury; but it was not proved by Rhine on his examination, that he did treat the jury, otherwise than as above stated.

On the fourth ground: Three of the jurors on the cause being opened by one of the plaintiff's counsel, declared their opinions then to be with them, before the witnesses were sworn. And one of the jurors swore that he was still dissatisfied with his verdict.

The fifth ground appeared by no means supported by proof. The expressions which had been made use of were delivered in jest, and did not, in the least degree, intimidate the dissenting jurors. It was therefore abandoned on the argument.

In the course of reading the affidavits, the deposition of William Crawford, the son of one of the defendants, was offered to the Court; but on an objection being taken, that he was entitled as a remainder man after his father's death, under the deed by which the defendants claimed, and therefore interested, he was waived.

The defendants' counsel made no observations with respect to

the weight of evidence, but submitted that point solely to the report of the judges who tried the cause, agreeing that, when no direct charge had been given to the jury, the Court should exercise their superintending powers with caution.

Their example was followed by the plaintiff's counsel, who barely cited 1 Burr. 397. 5 Bac. Abr. 246.

On the second ground, the defendants' counsel contended that, where a fair trial had not been had, the Court would interpose and grant a new trial. Skiles's mind was not as *white paper*. He had laid bets on both sides, and therefore, evidence on such a man would not make the proper impression. The act of assembly prescribing the sheriff's oath as to returning an indifferent jury (2 Dall. Laws, 262, § 2), and his fixing up lists in his own and the clerks' offices seven days before the Court (Ib. 264, 6, 8), in order that the parties might make their challenges, would furnish no means of knowledge concerning Skiles betting on the event of the cause. The defendants knew nothing of his wagers at the time of the jury being sworn, and therefore could not challenge him. The quantum of the bet made no difference in law.

A juror should be as white paper—superior to all suspicion of partiality. 1 Bl. Rep. 481. Discovery of material evidence after trial, as perjury and combination of witnesses, new trial granted. 3 Burr. 1772. So of a receipt found after the trial. 2 Bl. Rep. 955, 956. Motion for a new trial not to be made after motion in arrest of judgment; *aliter* where the matter on which such motion is founded was not discovered till afterwards. 5 Bac. 239. Matter discovered after the trial is a good ground for a new trial. 12 Mod. 584. 21 Vin. 493, pl. 11. Cause of challenge not known at the trial, will warrant the granting a new trial. 11 Mod. 119. 7 Mod. 54. 5 Bac. 243. And it has been even carried so far, where the cause of challenge was known at the trial. Comy. 602. A juror challenged, and afterwards sworn as a talesman, by a wrong name, is a ground for a new trial, though no fault be found with the verdict. 2 Lord Raym. 1410. S. C. 1 Stra. 640. Solicitor misbehaving himself by writing letters to two of the jury before the trial, importuning them to appear, and setting forth his client's hardships, and that he had verdicts for his title, the trial set aside. 2 Vent. 173.

To which it was answered by the plaintiff's counsel, that this was as fair a trial as could possibly be had, under the circumstances of the case. The point in controversy was the sanity of Daniel M'Causland, and must, frequently, have been matter of conversation in the county of Lancaster. Different sentiments

would be formed on the different representations of the case made to individuals, and it is not wonderful that wagers should be laid according to the impressions made by the several stories. Skiles knew nothing of his being on the jury when he laid the bet. But it could not prejudice his judgment against the defendants. The influence, if any, was the other way. He had laid three wagers — one gallon and one half-pint, on the defendants, and one pint on the plaintiff; which was above eight to one in the defendants' favor. Great inconveniences would arise from adopting the defendants' objection at this period. They ought to have made it earlier. If they really did not know of the wager when the jury were sworn, they knew it shortly after. The party should not lay by until he knows the event, and then make his exception. The case of *Spong et al. vs. Lesher* is much stronger than the present; there a communication was made immediately by the defendants' counsel of the near affinity of a juror to one of the plaintiffs, but the Court would not grant a new trial. If jurors, by laying wagers on one side of the question, can incapacitate themselves from acting in that character, difficulties enough will occur in procuring juries in causes of any magnitude. The act of assembly which has been quoted by the defendants goes as far as human wisdom can devise to give the parties an opportunity of making their challenges. A particular case occurring ought not to altar the law.

A *principal* challenge to a juror is where there is express favor or malice, and disqualifies at once; but a challenge to the *favor* is discretionary in the Court. Co. Lit. 157, b. A challenge must be made before the juror is sworn, and cannot be received afterwards, though on an indictment for murder. Yelv. 23. The same law obtains in civil suits (2 H. H. P. C. 274); and the principle is recognized, though the objection be not known at the time. Co. Lit. 158, a, 2 Rol. Abr. 658, pl. 5, 6.

So where a juror was related to one of the parties. Style, 100. The jury loses his challenge by not making it in time. Ib. 129. So where a juror was related to one of the creditors of a bankrupt. 1 Vent. 30. And it appears, by the same case in 2 Keb. 498, that the cause of challenge was not known at the time. A juror being of kin in the ninth degree is a principal cause of challenge. 3 Bl. Com. 363. The present objection is analogous to an exception against the competency of a witness, which must be taken before he is sworn and examined, otherwise it comes too late, and the party shall not afterwards avail himself of it. 4 Burr. 2252.

On the third ground, the counsel for the defendants insisted that the evidence proved the fact, that one of the lessors of the

plaintiff had treated the jury. The consequences of such practices must be very obvious. They engage the gratitude of the jury, and lay them open to improper impressions.

The evidence openly given in Court will have little effect where such methods obtain. The drinking publicly, or the jurors calling for wine, makes no difference as to the rule of law. If jurors eat or drink at the charge of him for whom the verdict is given, before they are agreed on the verdict, it will avoid it. Bull. Ni. Prius, 303, 820, 4to edit. 12 Mod. 111.

To this the plaintiff's counsel remarked that the fact was not proved. It must clearly appear that the treat was given by and at the expense of the party, or some agent for him. 1 Vent. 124. 1 Tri. per Pais, 260 (8th edit). William M'Causland, junior, must necessarily, at some time, have met with some of the jurors in the taverns where his witnesses lodged; and it was impracticable for him, during the crowd of the assizes, always to obtain a private room for his refreshment. His drinking with some of the jurors out of the same bottle or pint where each paid his proportion of the liquor, though the specific wine of each could not be distinguished, without conversing on the merits of the cause, could produce no improper effect. The juror who eat with him paid his own club, and did not sup at his expense. Rhine must have mistaken his expressions that no one but he could prove that he had treated the jury; inasmuch as upon his examination he could not ascertain the fact. In Bull. 303, 4to edit., Cro. Jac. 21, it is laid down, that the misbehavior of the jury ought to be certified by the judges on the *postea*.

On the fourth ground, the defendants contended that the premature declarations of some of the jurors before the evidence was heard, clearly evinced their partiality for the plaintiffs. Jurors should be *omni exceptione majores*; if they have declared their opinions, it is a good cause of challenge. Bull. 302. New trials are granted where any of the jury declare that a party shall not have a verdict, let him produce what evidence he will. Ib. 320. 2 Salk. 645. And where a juror declared at the view, that by what they had seen they should soon determine the dispute; and, the day before the trial, said, the plaintiff was a neighbor, and, right or wrong, he would give it for him,—though these words were even known before the trial, the Court granted a new trial against the opinion of Baron Parker. Comy. 602. This prejudging of a cause is a most effectual bar to the admin-

istration of justice. Besides, one of the jurors swears he is now dissatisfied with the verdict.

The plaintiff's counsel observed, their remarks under the second head were equally applicable to this point. It could not reasonably be expected that the minds of jurors taken *de vice-neto* could be as white paper. This had been a case of great public expectation, and many people must early have formed ideas of the event. In the remarkable case of Thune, on a policy of insurance, which had been often tried, three of the jurors declared that they had made up their minds on the representations made to them of the circumstances attending it; yet, though this was known to the Court, they were ordered to be sworn. No case can be cited where a verdict has been set aside, merely because a juror has expressed an opinion after the Court being opened, or before; This is materially different from a juror saying he would find in one way, at all events. When such sentiments have been disclosed by a juror before he is sworn, it may be a cause of challenge to the favor, but this is no ground for a new trial under any adjudication we have met with. There must be malice or favor in the words of a juror, to make them a principal cause of challenge. 21 Vin. 266, pl. 8. 2 Hawk. 418, § 28. 2 Rol. Ab. 657. 3 Bac. Ab. 259. Brook, Challenge, pl. 55. F. N. B. 22. 1 Tri. Per Pais, 189 (8th edit.). As to the juror, who is still dissatisfied, his scruples can have no weight; they have probably been superinduced by communications since the trial. Jurors shall not be permitted to invalidate a verdict which they have given. 2 Bl. Rep. 803. Sayer's Rep. 100. 2 Term Rep. 281. Andrews, 382. Finally, they said:—

The case in Comy. 601, 602, so much relied on, cannot be law, from the reason of the thing. Besides, it stands opposed to all the authorities, particularly those in Style, 100, 129. 11 Mod. 119.

By the Court. The last exception to the verdict has been properly relinquished on the argument.

Neither was the first insisted on, with much hopes of success. The judges who tried the cause did not sum up the evidence in their charge to the jury. The trial had continued five days; a great number of witnesses were examined as to a variety of facts, and both the law and fact were fully considered, and very ably argued by the counsel on both sides. The Court, under a few general remarks, left the matter of fact solely to the decision

of the jury; and we now feel ourselves precluded from giving our sentiments on the weight of evidence, either way.

The second, third, and fourth objections against the verdict may be considered under two heads: the *misbehaviour* of some of the jurors in laying wagers, and in eating and drinking at the plaintiff's expense, and of others *prejudging* the cause.

As to Skiles's betting, unless it produced a bias on his mind, it cannot be a reasonable ground of exception. If we suppose him so interested a character as to be capable of giving an improper verdict, to gain a wager of a pint of wine, we must also necessarily suppose, that the loss of a gallon and one half pint would make a still stronger impression on him, and influence his judgment on the other side. But it appears from the testimony that, when Mercer offered to pay the wine he had lost to him, he actually forgot that he had laid the wager with him. We must, therefore, conclude that he was not biased in favor of the plaintiff, by this small bet.

The evidence is not sufficiently strong to establish the jurors' eating and drinking at the plaintiff's expense. We shall always discountenance such practises; but the law calls for clear and full proof. Wherever it appears to be done to induce favor, we shall not fail to punish such conduct. But unless there was management, or the intention of young William M'Causland was criminal in what he did, it could have no effect on the verdict. We see no circumstances from whence we can infer undue management, or a criminal intention. The proof is also defective, as to any of the jurors prejudging the cause. It were much to be wished that the minds of jurors should be as white paper, but it can scarcely be expected, where they come *de vicineto*. Every judicial, as well as political, system, has its disadvantages, as well as advantages. The *view* previous to the trial, was an improper measure; it could answer no purpose, that could not fully be supplied by oral proof; and some of the jurors may have received improper impressions there. But *prejudging*, and giving an *opinion*, on the statement of certain facts, are very different things. The first implies a strong disposition to favor the one side or the other, a determination to find in one way, let the evidence be what it will. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made may be effaced by the production of other evidence. It was natural enough for some of the jurors to discover an inclination towards the plaintiff, upon a very full and elaborate opening by one of his counsel; but this, most probably, was under an idea that the facts stated would be fully proved. It is material to consider also, that what the jurors did say, was amongst them-

selves only. Our own experience teaches us that few persons can keep their minds in perfect *equilibrio* upon hearing a strong statement on one side only. Such leanings, however, ought to be guarded against, and resisted with firmness, until the whole evidence is gone through and closed.

We are, on the whole, of opinion, that the rule to show cause should be discharged; and we are strengthened therein by the consideration, that this trial is not peremptory, but the defendants may, if they think proper, commence a new ejectment.

Rule discharged.

Messrs. Ingersol, J. B. M'Kean, and Hopkins, *pro quer.*

Messrs. Tilghman and Montgomery, *pro def.*

AT NISI PRIUS, AT WESTCHESTER,
APRIL ASSIZES, 1794.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.

JOSEPH SPEAR vs. JAMES HANNUM and GEORGE HARLAM.

Lands are not pledged or mortgaged for the debts of a testator or intestate, nor can such debts be considered as liens thereon.

Where executors sell lands under a proper power in a will, though they afterwards misapply the money, the creditors of the testator cannot take such lands in execution.

DEBT, 939*l.* 8*s.* 10*d.* *sur* obligation, dated 29th November, 1784, conditioned for the payment of 469*l.* 14*s.* 5*d.* and interest, on the 29th April, 1785.

Plea, payment, with leave to give the special matters in evidence. Replication, *non solverunt* and issue.

The case on evidence turned out as follows:—

Nathaniel Ring being seized (*inter alias terras*) of a tract of land in West Marlborough township, called the “Indian Fields,” containing about 140 acres, by will dated 29th November, 1766, devised the one-third of his whole estate to his wife, Elizabeth; and, after bequeathing several pecuniary legacies, devised the residue of his estate to Hannah, the wife of Thomas Gibson.

Elizabeth Ring, his widow, by will dated 17th January, 1784, after bequeathing sundry legacies, “willed and allowed her plantation, called the Indian Fields, to be sold by her executors, at which time they should see to be best convenient after her decease, and what would remain from the sale thereof to be divided in proportion among her legatees.” She appointed Joseph Spear, the plaintiff, and one Jacob Chandler, since deceased, her executors thereof.

On the 29th April, 1784, the “Indian Fields” tract was put up at vendue and sold at 8*l.* 19*s.* 6*d.* per acre, to James Hannum, one of the defendants; the one moiety to be paid when he should receive possession, and the residue on the expiration of one year, with interest. The executors agreed to give a *sufficient deed in fee*, when one moiety of the money should be paid, by the conditions of sale.

Previous hereto, on the 24th July, 1765, the said Nathaniel Ring, and Elizabeth, his wife, had executed a mortgage to Joseph Parker, of the Indian Fields tract, together with a grist mill and saw mill, and 100 acres of land, and another tract of 200 acres, to secure the payment of 691*l.* 10*s.* and interest.

On the 29th of November, 1784, the defendants executed a bond of indemnity to the plaintiff and Chandler, wherein, after reciting the mortgage to Parker, Hannum covenanted to take the mortgage on himself in part of his purchase money, and procure a release of the liens of the other two tracts by the 29th April, 1785, and generally to indemnify the executors by reason of the mortgage, against all damages and costs.

He then also executed the bond, which was the subject of controversy, for the balance of the purchase money and interest, deducting the amount of the mortgage and interest, and 126*l.* which he had paid on account, and received a deed from the executors for the Indian Fields Tract, subject to the mortgage, with no other covenant therein, than that they had suffered no incumbrances thereon.

On the 2d December, 1784, Mary Norris, Administratrix of Joseph Parker, entered up judgment on the bond accompanying the mortgage.

On the 1st September, 1785, and 31st October, 1786, three other judgments were entered against the executors of Elizabeth Ring, and one judgment against the executors of Nathaniel Ring, for 36*l.* 7*s.* 4*d.*, the whole amounting to 328*l.* 18*s.* 3*d.*

Thomas Gibson and Hannah, his wife, the residuary devisee of Nathaniel Ring, having brought their action for the sum due to them under the will of the said Nathaniel, to February term 1785, against the executors of Elizabeth Ring, obtained judgment therein on the report of referees, in the Common Pleas of Chester county, in September term, 1788, for 1256*l.* 4*s.* 4*d.* and 73*l.* 3*s.* 6*d.* costs, which, on being removed into the Supreme Court by writ of error, was affirmed on the 7th October, 1790.

Afterwards, in pursuance of a *levari facias* issued on the judgment, founded on the mortgage, the Indian Fields Tract was sold for 454*l.*; the grist mill and saw mill, and 100 acres of land, for 518*l.*; and the 200 acres tract for 330*l.* by the sheriff, on the 19th January, 1789, by way of public vendue.

On the judgment of Gibson and wife, three other tracts of Elizabeth Ring's land were sold by the sheriff on the 11th March, 1791, for 1405*l.*

It appeared in evidence that Hannum, shortly after the sale of the Indian Fields Tract by the executors, entered thereon and held the possession until the sale under the mortgage; but that in the latter end of 1785 or beginning of 1786, he demanded security for his title, alleging that he was not safe in paying his money without it, and further saying that the executors should repay him his money and take back the tract. Lands had greatly sunk in value at this period.

On the other hand it was shown that Gibson had engaged to Hannum, that nothing should be wanting on the part of himself or his wife, to strengthen his title to the Indian Fields Tract; and Gibson directed the under sheriff not to levy on that tract under his judgment, as it was already sold at so good a price.

On the part of the plaintiff it was urged that by the defendant's breach of contract, a great destruction of property had taken place. Had they paid according to the condition of their bond the price of the Indian Fields Tract, two other valuable tracts would have been saved from a sheriff's sale. The whole estate was wasted, and 600% of debts and legacies remained unpaid; whereas, by a fulfillment of their agreement, it would have produced a neat balance of above 2000% after discharging every demand against it.

It is to be presumed that Hannum knew at the time of sale of Parker's mortgage, from its notoriety in the neighborhood; but admitting that he was then unacquainted with it, he, by his bond of indemnity at a subsequent period, took that incumbrance on himself, and agreed to discharge it. He accepted a conveyance subject to the mortgage.

He might have been made perfectly secure in his right, by either purchasing the lands at the sheriff's sale, or by paying off the mortgage and taking an assignment thereof. There is no reasonable ground to suppose he would have been bid upon, and it never was required that he should surmount the stipulated sum. A mortgagee, till he is fully satisfied, is not obliged to quit the possession to a purchaser. 2 Atky. 2. The assignee of a mortgage stands precisely in the same state as the first mortgagee, except that the interest in arrear would form part of a new principal, carrying interest. 2 Comy. Dig. 303. Hannum would therefore have been invulnerable in all possible circumstances.

It was not reasonable to ask security of executors for acts done in the discharge of their duty; nor is there any proof of a promise by them to give such security. The vendee was satisfied with the covenant in his deed, that the executors had suffered no incumbrances: it is therefore similar to the case of lands sold and conveyed with special warranty, and the purchaser afterwards insisting on a new and general warranty. The contract was fully completed when the deed was executed and the bonds given, and nothing remained to be done by the executors. Gibson and his wife were bound by their engagement, and the law would not have permitted them to recede therefrom. Their promise in this particular was equivalent to a release.

The cases of *Graff v. Smith's administrators* (Dallas, 481), and

Morris's lessee v. Smith, determined in bank, April term, 1793, on a case stated, do not prove the defendant's doctrine. They go no further than to establish a lien in favor of creditors, in the instance of an intestate's heir selling to a third person. No part of the reasoning in the former case of *Mr. President Shippen*, applies beyond the instances of an heir or devisee; and his observations fairly construed, are referable only to those two cases. The principle which he lays down does not apply to an executor selling lands in pursuance of an authority; for there is a privity between the creditors and executor, though not between them and the heir or devisee; and on the same ground that it is resolved in *Dall. 486*, that lands sold by an administrator in pursuance of an order of Orphan's Court, cease to be assets, and are freed from any supposed lien of debts, lands sold *bona fide* under a power in a will, must also be exempted from any responsibility to creditors.

Where there is a trust or devise for payment of debts generally, a purchaser is not obliged to see to the application of his money, as he is when there is a schedule or particularizing of the debts. *Ambl. 189*. Cases of fraudulent sales are exceptions to the general rule, and they will clearly be bad. *Id. 2 Vern. 616*. At law an executor may alien the assets of a testator, and when aliened no creditor can follow them. Where the alienation is *bona fide* and for a valuable consideration, equity also suffers it. *1 Atky. 463. 2 Atky. 41. 3 Atky. 237, 241*.

It may be urged, that debts by our law are liens on real estates, where a person dies either testate or intestate. We deny that doctrine in the large extent, though we admit them to be funds out of which debts must be paid in case of a deficiency of personal property. We view them merely as assets, and when sold by an administrator in due course of law, or by an executor in pursuance of a proper authority *bona fide*, they can be no more resorted to than goods or mere chattel interests sold in the proper course of administration.

In England, where the debt is a specialty, lands remain chargeable, unless the heir sells them before the suing of the writ. Why shall not the same doctrine hold here, where a power is given to executors to sell? There is nothing in our peculiar customs or the texture of our laws which interdicts it. But to say that the lands after such sale remain chargeable to creditors is, in effect, declaring that such powers in a will are fruitless and nugatory; for who would buy from executors if such were the law? How can a fair purchaser be supposed to know of the existing debts of a testator, unless he particularizes them in his will? If such were the decisions, he would be bound to look to the appropriation of his money.

We have been taught to believe, that the vesting executors with authority to sell lands, in order to pay debts and legacies, is extremely beneficial as well to creditors as legatees. But if the doctrine of the defendants is sanctified, no titles will be deemed valid, unless secured by the instrumentality of sheriff's sales, and the money intended, by the justice or bounty of a testator, to go into one channel, will be diverted to the payment of accumulated costs, and the purposes of the will will be effectually frustrated.

On the part of the defendants it was contended, that the evident intention of the contract, which gave birth to the bond, was that the vendee should be secure in a sufficient title. He was not bound to pay in the first instance, and afterwards wait for his right. The executors had sold lands under mortgage, without acquainting Hannum therewith, which was a legal fraud in them.

The suit of Gibson and wife was brought to February term 1785, and operated as notice of a claim on the lands agreed to be sold. The condition of the present bond was to pay at a subsequent period, viz: on the 29th April, 1785. If it should be supposed that these lands were exempted by the sale, from the lien of Elizabeth Ring's debts, still the step pursued by Gibson and his wife would make any prudent person cautious in paying until he was fully indemnified. But the laws of Pennsylvania are favorable to the claims of creditors from its first settlement.

The case of Morris's lessee *vs.* Smith (238 *ante*), determined that lands aliened *bona fide* by the heir were subject to the debts of the ancestor. It must now therefore be conceded, that lands are bound for the payment of debts, in case of an intestacy. Why should not this equally hold in the case of a will? Can a person by sealing and publishing a paper, effect so material a change?

In the case of Graff *vs.* Smith's administrators (Dall. 481), this doctrine is very fully considered by Mr. President Shippen, and (in pa. 484) he draws this general deduction from the whole of his reasoning, that the "lands of deceased persons have always heretofore been considered as liable to be taken in execution for debt, in the hands of a purchaser from the heir or devisee." Now what sound reason can be given that a difference should be made between the case of a purchaser under a devisee, and under executors having authority to sell real property? Their powers are derived equally from the same source, the will of the testator. But it is said that a distinction has been drawn in Dall. 486, between purchasers from administra-

tors under an order of the Orphans' Court, and voluntary purchasers from an heir. To which it may be answered, that this is but an *obiter dictum* of the president, the point confessedly not being regularly before the Court. Taking it, however, to be otherwise, there is this striking difference between the cases. There the administrators sell by the words of a positive law, which gives jurisdiction to the Orphans' Court. The intention of the legislature must necessarily have been, that the lien of the creditors in such cases should be taken away and destroyed; otherwise the law would be fruitless, and attended with consequences manifestly injurious to society. Here the purchaser could shelter himself under no positive law, and he contends that the title was never so *absolutely* vested in him as to be freed from the claims of creditors under the deed from the executors. Were the doctrine contrary to what we insist on, great frauds might be practised by testators, their executors, and purchasers under them, which would, in most instances, escape detection.

It is admitted that in England, executors selling lands under a general authority, without a schedule of debts and legacies, the vendee is not bound to see to the application of the money. But in that kingdom, lands are not subject to the payment of simple contract debts; and in the case of specialty debts, where the heir at law aliens lands *bona fide*, before the action brought, such lands shall not be liable to execution, by the express provision of 3 and 4 W. and M. c. 14. It is evident, therefore, that under the municipal laws of that country, the creditors have only an *eventual* lien on the lands of a deceased person, depending on their own acts and those of the heir or devisee. But under the spirit and true intent of our laws, there is a general pervading lien on the lands immediately on the decease of the party. It is then asked, if a case can be shown in England where, when the lien is attached by a suit on a specialty debt, a subsequent sale by an heir or devisee can destroy such lien? If no such instance can be shown, there are strong features of resemblance between the law there and the general lien which prevails in Pennsylvania, on the death of a testator or intestate. The case of a testator directing lands to be sold for payment of his debts, in some degree resembles schedule debts. It operates as notice to a purchaser to guard and protect himself.

On the point of general inconvenience, it is submitted whether greater evils would not result to creditors from lessening their liens than the accumulated costs which would arise from sheriff's sales.

The plaintiff had no reason to expect, after instituting a suit against Hannum, that he should buy in his lands for his own

protection, at a sheriff's sale. Besides, he might have been bid upon; and if he was to be thus secured, he might have been obliged to buy beyond the terms of his contract. If Gibson and his wife meant to strengthen Hannum's title, why did they not execute a release and tender it to him? Their original suit evidently impeached his title. In debt on bond, on the plea of payment, every thing shall be presumed to be paid, which in conscience ought not to be paid. Dall. 260. A sells to B, with covenants only against himself and those claiming under him; the lands were evicted by title paramount; B was relieved from payment of the purchase money, which he had secured, seeing the land was lost. 1 Eqn. Ca. Ab. 27, pl. 2. A man bought his *own* lands of another, and paid the money, he will be entitled, in equity, to recover back the money with interests and costs. 1 Vez. 126.

By the Court. There is no doubt, but if in equity and good conscience, this bond ought not to be paid, the verdict ought to be for the defendants. On the other hand, if no good or legal objection can be made against it, the welfare of society requires it should be enforced as a fair contract.

It is also clear, that no solid argument against the discharge of the bond can be founded on the sheriff's sale under the mortgage. Hannum accepted the deed, subject to the mortgage, and agreed to take it on himself, and free the other two tracts comprised therein from that incumbrance. He ought, therefore, to have paid it under the terms of his own contract, and he shall not now be permitted to shelter himself under his own default. Had he complied with his agreement, the Indian Fields tract could never have been sold under the *levari facias*, but with his consent. It has been said that he was not obliged to purchase at the sheriff's sale for his own protection. It would have been fortunate if either he or the executors had taken this step; it would have prevented a great waste of property. The difference of the price stipulated to be paid by him, and the sum it afterwards sold for, was no less than 808*l.* 4*s.* 4½*d.* exclusive of interest on the original sum for near four years and nine months.

But the defendant's counsel rest on a legal objection against the plaintiff's recovery, and contend that the executors could not make a *sufficient deed*, freed from the creditors and legatees of Nathaniel and Elizabeth Ring. The point agitated before us is new, so far as we know, and we should have been well pleased to have avoided, with propriety, the giving of our opinion without more full reflection. But it is absolutely necessary that our present sentiments should be made known, in order to obtain a verdict. We consider the point as reserved for future discussion, in case the verdict shall be for the plaintiff.

The defendants ground the liability of these lands to pay the debts and legacies of Nathaniel and Elizabeth Ring, on the peculiar laws and customs of this government.

The first act which occurs respecting the present question, is among the laws agreed on in England in 1682, § 14 (Append. to Prov. Laws, edit. 1775, pa. 4), which directs "that all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods and one-third of the land only."

Then another act, chap. 51 (Append. pa. 7), which, in the case of issue, renders one-half of the land liable to debts, "provided the land was bought before the debts were contracted."

Then the act, chap. 119 (Append. pa. 9), directs how the estate of any person shall be disposed of, "his debts being first paid."

Next follows the act of 1688, chap. 189 (Append. pa. 10), which provides "that all lands whatsoever and houses shall be liable to sale upon judgment and execution, against the defendant, his heirs, executors or administrators," but this act was limited in its duration to one year, and until 20 days after the rising of the next general assembly. This law was continued under the administration of Governor Fletcher, in 1693 (Append. pa. 12), and was afterwards re-enacted in 1694, in the same words as a perpetual act.

Then succeeded the act of 12 Will. 3, in 1700 (Prov. Laws, pa. 6), which is still in force, and is penned in the same terms with the additional words, "where no sufficient personal estate is to be found." And then came the act of 1605 (Ib. 49).

Upon the best consideration we have been able to give on the sudden, of the case before us, we do not conceive that the legislature, in the different laws we have enumerated, ever intended to go further than to make lands assets for the payment of debts, upon a deficiency of personal property, in the same manner that mere goods and chattels were before assets at law in the cases of deceased persons. Under our idea, lands were not pledged or mortgaged for the debts of a testator or intestate: they were not more pointedly made chargeable or liable for such debts, than personal estate was previously thereto, nor could such debts be properly considered as liens thereon. If a sheriff sells the lands of a testator or intestate in a due course of law, he must pay the balance, after deducting the debts and costs, to the executor or administrator of such deceased; should they squander the money, it will not be pretended that other creditors can look again to the lands. So, where an administrator sells lands in pursuance of an order of Orphans' Court, but embezzles the

money, and afterward becomes insolvent, the creditors cannot take the lands thus sold in execution. An honest sale by executors under proper authority, is equally valid and legal; and why should not the same consequences follow, though the executors should afterward misapply the money paid to them? What sound principle of policy or reason can be shown discriminating between a *bona fide* sale of real estate by executors duly empowered, and a sale of personal estate by them, or by administrators, in the common course of administration? Vide Barnard. Cha. Ca. 78.

Nevertheless, the question is a new one in this state. Neither the case of Graff *vs.* Smith's administrators, or Morris's lessee *vs.* Smith, decides the point; wherefore, the defendants shall have an opportunity of bringing the matter of law before the whole Court in bank, that a question of so much magnitude may be finally settled.

[At the instance of the defendant's counsel it was then agreed, that a bill of exceptions should be taken, and that the point reserved should form part of the record, that either party *might* in the *dernier* resort, carry it up to the High Court of Errors and Appeals, if they should think proper so to do.]

Verdict for the plaintiff for 735*l.* 2*s.* 6*d.* costs.

Messrs. Ingersoll and Wilcocks, *pro quer.*

Messrs. Tilgham, J. B. M'Kean and J. Ross, *pro def.*

[A bill of exceptions was drawn up by counsel, and signed by the chief justice, and a writ of error was afterwards brought on the judgment on this verdict, returnable to the High Court of Errors and Appeals, and the judgment was afterward reversed, 16th September, 1795, on a different ground from that taken at the trial.] See 2 Dallas, 291; *post*, 553.

JANE SHARP vs. WILLIAM PETTIT.*

Where the lands of the husband whereof he is seized in fee tail during marriage, are sold on judgments obtained against him, and he afterwards suffers a common recovery without making his wife a party, or her executing the deed to lead the uses, and she survives him, she is not barred of her dower.

DOWER of 250 acres of land in Sadbury township. Plea, *ne unques seisie que dower*, with leave to give the special matters in evidence.

The case in effect was: Joseph Sharp married the demandant, and afterward became seized of the lands in fee tail under the will of his father.

In 1784 two judgments were obtained against him, and the sheriff, on the 30th September, 1785, sold and conveyed the premises to Thomas Allen, who conveyed to the tenant. In February term, 1788, a common recovery was suffered in the Common Pleas of Chester county, without making the demandant a party, or her executing the deed to lead the uses, or any separate examination of the feme. The uses were declared to be for Pettit. Joseph Sharp died in 1790, and the question was, whether under these proceedings the widow was barred of her dower.

Per Curiam. Dower is not only a legal but a moral right, and is highly favored. A woman shall be endowed even of an estate tail determined. Co. Lit. 31. b. The life estate of the baron could only be sold by the sheriff, independent of the common recovery. Until that procedure took place, Joseph Sharp could convey no greater right than he himself had, nor could the sheriff sell more than he (Sharp) could convey. The right of the feme to dower is not affected by this common recovery. She was no party thereto; nor has she executed the deed to lead the uses, nor been separately examined. As to her therefore, the proceedings are void, though if properly conducted, they may bar the issue in tail. The demandant, under our opinion, is entitled to her dower; but if the tenant is dissatisfied therewith, he may move us in bank for a new trial, on the point of misdirection.†

Verdict for the demandant.

Mr. Roberts, *pro dem.* Mr. J. Ross, *pro tenents.*

The point was not stirred again in bank, but damages and costs being afterwards given by an inquisition on a writ of inquiry, the same was set aside by the Court in September term, 1800, and judgment was rendered for the demandant on the writ of seisin.

*See pp. 427 and 244. †See 4 S. and R. 509.

AT NISI PRIUS, AT LANCASTER,

MAY ASSIZES, 1794.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.Lessee of PHILIP GALLAGHER *vs.* GEORGE ROGERS.

The declarations of the widow of the testator (to whom the real estate was devised for life), that the will was made by her undue influence and imposition on the testator, shall not be given in evidence to operate against the remainder man.

EJECTMENT of a messuage and garden in Mannor township.

The lessor of the plaintiff claimed title under the will of his father-in-law, Thomas Patton, who died seized of the premises in fee. He devised "to his wife, Summer Patton, the house wherein he dwelled, and the profits of his farm during her natural life, and after her decease all his lands in Mannor township to Phillip Gallagher, &c." The widow was since dead.

The defendant was also a son-in-law of the testator, and contended that the will was made by undue influence of the wife, and imposition practised on him, and that Gallagher had joined her in this business.

To prove this, the defendant's counsel offered Peter Row as a witness, to show that Summer Patton, after her husband's death, had made declarations of this nature to him, and cited 1 Black. Rep. 345. S. C. 3 Burr. 1244.

Sed per Cur. The testimony cannot be received on this trial, though it might have been admitted against the widow. Her influence, importunity, or arts of imposition on her husband may be proved as facts, but not by her confession, to operate against a third person. The case of Clymer's lessee *vs.* Littler, *et. al.* cited, was determined on its peculiar circumstances, and no general rule can be drawn from it. The declarations of William Medilcott there, in his last illness, of the forgery committed by him of the instrument of 1745, came out on the cross examination of the counsel, who afterwards excepted to its production; and no objection was made to it at the trial. The Court declared, that the competency of evidence depended upon the circumstances under which it was given. 1 Black. Rep. 349. 3 Burr. 1255. We think that case and the present very differently circumstanced, and therefore overrule the evidence.

The defendant wholly failed in proving any influence or imposition.

Verdict *pro quer.*

Messrs. Kittera and C. Smith, *pro quer.*

Mr. Montgomery, *pro def.*

JAMES JACKS *vs.* GEORGE MOORE.

In debt on bond, if the defendant pleaded a set off specially, he would not be bound to give any written notice to the plaintiff, who should reply the statute of limitations, if the set off was barred thereby.

If the set off be offered in evidence, on a notice of set off, it cannot be received where it is barred by the statute.

DEBT, 152*l.* 5*s.* *sur* obligation. Oyer of specialty and special imparlance. Plea, payment, with leave to give the special matters in evidence, with notice of set off. Replication, *non solvit*, and issue.

The defendant offered to show in evidence, that his son John Moore, during his minority, in 1784, performed services for ten months for the plaintiff, during the time he held the offices of recorder of deeds and register of wills in the county of Lancaster, and claimed a reasonable compensation therefor.

This was objected to by the plaintiff, who denied that any allowance was ever in the contemplation of the parties, when the son wrote in the office, he then not being sixteen years old. The bond was dated 26th December, 1785, subsequent to this transaction, and had been previously renewed.

He contended that supposing it to have been a real debt, it was barred by the statute of limitations, and could not now be set off, and cited Bull. Ni. Pri. 176. If the defendant meant to avail himself of the leave to give the special matter in evidence at the trial of the cause, he ought, under the 37th rule of practice of this Court to have given notice in writing at least ten days before, of the special fact or matter, on which he would rely, and which he intended by way of defense. On the foot of mutual dealings, he ought, under the 38th rule, to have given the like written notice, and at the same time furnished the plaintiff with a copy of his account. For non-compliance with these requisites, he is now precluded from giving the intended evidence.

Per Cur. If the defendant had pleaded the set-off specially he would have been under no necessity to have given any other written notice. It would then have been incumbent on the plaintiff to have replied the statute of limitations. Here the set-

off is not pleaded; and under the case cited, the evidence may be well objected to, on the mere notice of set-off. Evidence overruled.

Verdict *pro quer.* for 107*l.* 7*s.* 5*d.* debt, and 6*d.* costs.

Mr. Montgomery, *pro quer.* Mr. Hopkins, *pro def.*

MICHAEL HUBLEY, President of the Orphans' Court of Lancaster County, *vs.* JAMES HAMILTON.

On a valuation of the real estate of an intestate, the person accepting it is bound to pay interest for the distributive shares of the other children, from the time of his acceptance.

DEBT on recognizance, on the valuation of the real estate of a person who had died intestate.

A question was made in this cause, whether on the valuation of the real estate of an intestate, in case it could not be divided without prejudice to, or spoiling of the whole, the person accepting it was bound to pay interest for the distributive shares of the other children, from the time of the confirmation of the inquisition and his acceptance of the lands, or from the time limited and appointed by the Orphans' Court for the payment thereof.

Per Cur. The practise in Lancaster and most of the western counties, has been uniformly only to charge interest from the time affixed by the Orphans' Court; and most appraisements probably have been made under this idea of the usage. It might be inequitable therefore, to make this case an exception out of the general custom. But the act of 4 Geo. 3 (Prov. Laws, ed. 1775, pa. 308), does not warrant this construction. The men appointed by the Orphans' Court, or where the parties cannot agree, the inquest, are to make a just appraisement. The Orphans' Court are appointed to limit a reasonable time for the payment of the shares of the other children, but not to control or substantially alter the sum affixed by those on whom that duty devolves by law. Upon the same principles precisely, that a widow under the practise, gets her interest on one-third of the principal charged on the lands, from the time of the child's acceptance of the real property at a valuation. In order to obtain a subsistence thereout, the children ought to receive the interest on their distributive shares from the same period, and for the same purpose. The present usage is fundamentally wrong and must in future be altered.

Mr. Hopkins, *pro quer.* Mr. Montgomery, *pro def.*

LESSEE of JOHN STOUTTER vs. ROBERT COLEMAN, esq.

An instrument for the sale of lands shall be construed as a mere agreement, though it has very strong expressions of a deed, as "do grant, bargain and sell," in the present tense, if such appears to be the intention of the parties.

Where a vendor of lands has taken bonds for the purchase-money, if there is no receipt indorsed for the purchase-money, or proof that they were accepted as actual payment, and he keeps possession of the title papers, the lien continues on the lands, as between vendor and vendee, and those claiming under the latter with notice.

EJECTMENT of two hundred acres of land in Martick township.

It was admitted, that the lessor of the plaintiff was seized of the premises in question, and on the 7th February 1783, entered into *articles of agreement* with Matthias Slough, whereby "Stouffer granted, bargained, and sold, *and doth grant, bargain and sell*, one hundred acres of patented land, and one hundred acres of warranted land, to said Slough, his heirs and assigns, to hold the same to him, his heirs and assigns, to and for their use forever, in consideration of 675*l.*, to be paid as follows: 400*l.* to be paid on the 1st May, 1783, 137*l.*, 10*s.* on the 1st May, 1784, and 137*l.* 10*s.* on the 1st May, 1785, for which three bonds are given, bearing equal date with the articles. Stouffer covenants and grants that *he will, on or before the 1st May, 1785, execute, acknowledge and deliver a good and sufficient deed for the patent land, and a good and lawful bill of sale for the warranted land*, but Slough to pay Stouffer's wife 3*l.* for signing the deeds. Stouffer to be allowed to take away six trees and thirty cords of wood, sold to George Ratson. Peter Stouffer, the son of John Stouffer, to be allowed to live in the dwelling house until he can suit himself with another, but Slough to have possession of the other lands. And for the true performance of the said agreement, the parties bound themselves to each other in the penal sum of 1350*l.*" This instrument was recorded on the 14th October, 1790.

In pursuance thereof, Slough entered on the premises, cleared between fifteen and eighteen acres of meadow, run a water-course along the whole, and carried the water by pipes into his barn and kitchen, erected a large stone barn thereon, and cut down a considerable quantity of timber, which he converted into coals for Martick forge, which adjoined thereto, and then belonged to him.

The three bonds were put in suit to August term, 1786, and afterwards removed by *habeas corpus* into the Supreme Court, whereon judgments were entered on the 12th April, 1787, with a stay of execution for two months.

Three days after the cesset had expired, a commission of bankruptcy issued against Slough, and he afterwards obtained his certificate. No part whatever of the consideration money had been paid to Stouffer, who *kept the title deeds in his possession*, but the sum of 6*l.* 14*s.* 3*d.*, was charged against him by

Slough, for a stove and some sheet iron. Stouffer had given Slough no further assurance of the land. But previous to the commencement of the ejectment, Stouffer and his wife executed a conveyance to the assignees of Slough, and tendered it to them, to take effect on payment of the consideration money and interest. Mr. Coleman held the possession in behalf of himself and the other assignees.

For the plaintiff, it was argued that the evident intention of the parties was that the instrument on which the defendant relies, should operate as a mere agreement. It was called *articles*, it was *executory*, it did not bar the wife of Stouffer of her *dower*, no *receipt* was subscribed thereon for the consideration money, the *good and sufficient deed* was not to be made by Stouffer and his wife until the 1st May, 1785, when the residue of the consideration money was to be paid, it contained a *penalty* for non-performance, and Stouffer *kept the title deeds* in his own possession. No person could be deceived by the instrument. On inspection of the paper, a person would necessarily be led to inquire whether the bonds had been paid.

The intention of the parties must govern according to the subject matter. Lilly's Conv. 58. The whole contents of a deed must be considered, and every part judged of, to discover the intent. Hob. 275; 8 Co. 83. Though the most formal words of grant are used, yet if on the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease, the law will do violence to the words, rather than break through the intention of the parties. 3 Bac. Ab. 419, K. A paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself. 1 Term Rep. 735. The last two authorities are recognized in 2 Term Rep. 741, 742. [See 5 T. R. 167; 6 East 530; 8 East 165; 14 Ves. jr. 156.]

The cases of the lessee of Haines *vs.* Starret, at *Nisi Prius*, in Northumberland county, November assizes, 1788, Mitchell's lessee *vs.* Le Roche, on a case stated and argued in bank, April term, 1791, and Campbell's lessee *vs.* Sproat and Snodgrass, tried at *Nisi Prius*, at Lancaster, May assizes, 1793, and a motion for a new trial thereon, January term last, are all extremely opposite to the question now before the Court.

The act of assembly, of 1 Geo. 1, "for the acknowledging and recording of deeds," declares that the words, "grant, bargain, and sell," shall amount to an express covenant that the grantor

was seized of an indefeasible estate in fee simple, freed from incumbrances, and also for quiet enjoyment. But the law only intended thereby to guard against the mistakes of inexperienced scriveners.

A sells lands to B, who afterwards becomes a bankrupt, part of the purchase money not being paid. Lord Chancellor said, there is a natural equity that the land should stand charged with so much of the purchase money as remained unpaid, and that without any special agreement for that purpose. A shall not be bound to come in as a creditor. 1 Vern. 267, 268. S. C. 1 Equ. Ca. Ab. 56. S. P. 1 Pow. on Contracts, 257.

As between the vendor and vendee, the lien continues on the land for the remainder of the purchase money. The vendee is but a trustee as to the money for the vendor. 3 Atky. 273. If a conveyance be made of land, and the money not paid, as against vendee, his heir, or any claiming under him as purchaser with notice of this equity, the land may be resorted to. 2 Vez. 622.

In 1 Brown's Cha. Rep., 42, Lord Loughborough is made to say: "I have a decided remembrance of the case, where it was held, the lien continued although a bond was given on the sale of lands;" and in *Fowel vs. Heelis* (particularly stated in the note there) the ground of decision is stated by Mr. Mansfield (Ib. 422) "not only that the party had taken bonds, but had given up the deeds."

We may say with Ld. Ch. Just. Kenyon, in *Goodeson vs. Nunn*, 4 Term Rep. 764; "The covenants in these articles are dependant; when the one party conveyed his estate, he was to receive the purchase money, and when the other parted with his money he was to have the estate."

In the language of Lord Mansfield, as quoted by Buller, Justice, "the construction contended for against the plaintiff is, that in spite of his teeth, he shall be obliged to give personal credit to Slough; whereas the essence of the agreement was, that neither should trust the other personally." Ib. 765. Here a deed has been tendered by the plaintiff to the assignees, if they will comply with the contract of the bankrupt. Creditors at large trust to a personal credit; but one having a lien, trusts to the thing itself. The assignees of a bankrupt remain precisely in the same situation as the bankrupt himself. 2 Term Rep. 490 to 495.

The taking of the bonds cannot alter the nature of this case. If they had been accepted as payment, a receipt would have been indorsed on the articles. Neither will the judgments obtained on them alter the nature of the plaintiff's title. If no ob-

ligations had been given, and the agreement had been cautiously drawn up, without any present words of transfer, it will not be said that a suit brought, and judgment thereon, would deprive the plaintiff of his lien. Judgments on obligations taken will not vary the event. No laches can be imputed to the plaintiff. The actions which he brought were removed by the defendant for delay, and the stay of execution had expired only three days before the commission of bankrupt issued, which must have been founded on some previous act of bankruptcy.

The supposed improvements of Slough are not equivalent to the injury and waste done to his lands by cutting down all the valuable timber for his iron works, and deducting the profits he has received. Upon an estimate fairly made, with these deductions, if there is a balance due to the assignees of Slough, the plaintiff is willing to pay it.

The plaintiff's counsel observed that they came prepared to discuss a law point, not to enter into contracts for estimating waste, rents, and improvements.

The instrument in question may be called *articles*, but it is, in effect, a deed duly recorded. It is indented, and contains present substantial words of transfer, "do grant, bargain, and sell," which are certainly more operative under the act of 1 Geo. 1, than is admitted by the plaintiff's counsel. These are terms designated by the legislature for conveying a fee simple estate, certain absolute covenants are implied thereby. Stouffer unconditionally conveys the land to Slough, his heirs and assigns, and Slough, by an independent covenant, agrees to pay at the time therein mentioned, and actually gives bonds for the payments. This is a *personal* credit given to Slough, and shows that he actually intended to convey by that instrument. Such are the express words of the deed, and from these alone we must judge of his intentions. The agreement to make Slough a good and sufficient deed on the 1st of May, 1785, amounts only to a covenant of further assurance, and Slough was willing to run the chance of Stouffer's surviving his wife.

If there be sufficient words in a deed to declare legally and clearly the party's meaning, it is sufficient. 2 Bl. Com. 298. No lawyer would hesitate to say, on a perusal of this deed, that a good fee simple estate was vested thereby. The case, too, is strengthened by Slough receiving immediate possession, and exercising acts of absolute ownership. Stouffer can only blame his own negligence in not informing the scrivener that he was desirous of entering into a mere agreement to convey, if such were his real intentions. This is, in fact, a dispute between the

plaintiff and the creditors of Slough, who are to be considered as strangers. They trusted Slough from his visible and apparent property, and Stouffer lent his aid to furnish him with part of this false credit. He should not have superior advantages to those who have sold him goods, and must now come in for a dividend. The money which has been expended in improvements in consequence of the plaintiff's conduct, would have otherwise gone into the general mass of Slough's property, for the benefit of his creditors.

It is also of great moment to consider, that Stouffer has taken bonds for his money, has sued them, and recovered judgments thereon. If he had relied on the lands, as a lien, he should have commenced his ejectment on non-payment of the purchase money, and not brought debt on his bonds. He waived his fancied lien thereby, and he shall not now be allowed to affirm and disaffirm the same thing.

One selling goods and receiving a note, it is actual payment. *Aliter* where there is a precedent debt. 2 Ld. Raym. 929. A purchases lands of B, and mortgages back those lands for part of the purchase money, and gives a note to B for 200℥. the other part thereof. A devises those lands to be sold for payment of his debts. This 200℥. note though for part of the purchase money, shall not be preferred to other debts, nor be a charge on the land in equity. 2. Vern. 281.

None of the cases cited by the plaintiff prove that the lien continues on the sale of lands, when bonds have been taken for the purchase money. The *dictum* of Ld. Loughborough in 1 Bro. Cha. Rep. 421, is of little weight, and from the report of that case it appears, the point remained undecided. The case of *Fowell vs. Heelis*, in the note there, is contrary, and appears expressly in point. The circumstance of retaining the title deeds cannot be of so much consequence, as has been insisted on.

Haine's lessee *vs.* Starret, in Northumberland, did not receive the opinion of the Court. The plaintiff was non-suited for want of the defendant confessing lease, entry, and ouster.

In Mitchell's lessee *vs.* Le Roche, there was but a mere agreement to convey, and no personal security was taken.

In Campbell's lessee *vs.* Sprout and Snodgrass, the words of the instrument were "sell and deliver;" and stress was laid by the judge who tried the cause, on this circumstance, that it would have vested Campbell with an estate for life only, there being no words of inheritance.

We are informed, that in the case of *Switzer vs. Garber*, at Nisi Prius, in Cumberland, May, 1788, it was resolved by the Court, that a bond given on the sale of lands, was to be considered as a payment therefor.

When the parties are in equal equity the law must prevail. The legal title is in the assignees of Slough, under this instrument, which we contend has all the essentials of a deed. The creditors in general are concerned, who have the same claim to equity that Stouffer has; and though there may be an apparent hardship, he ought to be contented to come in as a creditor on the general funds of the estate. In a system of general laws, private inconveniences must always be submitted to. Stouffer must impute his loss to his own folly and negligence. He might have secured himself by a cautious conduct, and avoided conveying the lands. He might have obtained his money by suing at an earlier day,—or by taking out his executions in due time, and levying on Slough's property. *Vigilantibus non dormientibus leges subserviunt.*

M'Kean C. J. I sit singly in this cause; my brother Yeates, who was formerly of counsel with the plaintiff, declining to intermeddle therein. Reasonable proposals have been made on the part of the plaintiff, which have not been acceded to. It rests therefore to see what the law is, and how far the Court can interpose, to oblige all parties to do what is just and reasonable.

The legal and equitable construction of the articles must determine whether Stouffer shall be considered as a general creditor of Slough, or whether he has a lien on the premises.

The question shortly is, whether he actually sold and conveyed, or only agreed to sell and convey on certain terms. The instrument has very strong expressions in it, in the present tense, "do grant, bargain and sell." But the true intention must govern, if it can certainly be discovered. For the reasons offered by the plaintiff's counsel, I am satisfied, that the honest and true meaning of the parties was, that the writing was intended merely as an agreement to convey: judging of all the parts together, it cannot reasonably be construed otherwise.

The difficulty which then occurs, is Stouffer taking bonds for the purchase money. None of the cases cited come fully up to this point, except that in 1 Bro. Cha. Rep. 420, which was not finally decided on this question. The causes adjudged in this Court do not go so far, but those cited from the books in England fully prove the general doctrine, that as between the vendor and vendee of lands, and those claiming under the latter with notice, the lien continues. If Slough had sold over to a stranger without notice, a material difference would probably have arisen. Yet, though bonds were taken, there is no proof either in writing or by parol, that they were accepted as actual payment, nor is there any receipt indorsed for the consideration

money. It is very important, and weighs much with me, that the plaintiff kept possession of his title papers, which is strong evidence that he considered the land as his security until the purchase money was paid. Why else should he retain those muniments? This circumstance essentially distinguishes the cause before us from *Fowel vs. Heelis*, in 1 Bro. Cha. Rep. 421, where a contrary decree took place. [Vide Ambl. 724, where this case is more fully reported. Fonbla. Treat. Equ. 373.]

Had Slough's assignees brought their ejectment to recover the possession, I should be clearly of opinion, that without payment of the full consideration money and interest, they ought not to succeed. They stand in his place precisely. But here Stouffer comes into this Court as plaintiff, to ask equity, which is part of our law; to obtain it, he must do equity himself. Valuable improvements are suggested to have been made by Slough, and it is also said he has committed great waste on the wood land. A verdict should pass for the plaintiff. Stouffer ought to pay the assignees for the solid and permanent improvements which have been made on the land, deducting the rents and profits received, and the injuries and waste done to the premises. We both recommend that persons should be appointed to make this estimate, and we think complete justice and equity will be done in this mode.

The defendant's counsel, perceiving the opinion of the Court, acquiesced in the propositions, and three of the jurors were accordingly appointed by the chief justice.

Verdict *pro quer.*

Messrs. Kittera and C. Smith, *pro quer.*

Messrs. Montgomery, M'Kean, and Hall, *pro def.* [In 1st Mason's Rep. 213.]

AT NISI PRIUS, AT NORRISTOWN,
MAY ASSIZES, 1794.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.

JOHN WHITE, lessee of WILLIAM ARWIN, *vs.* PETER BISBING.

Where a dispute had been submitted to arbitrators, and a witness had been sworn before them who is since dead, his deposition shall be read in evidence between the same parties.

EJECTMENT of 20 acres of land in Groynd township.

This was a mere dispute about boundaries, and involved the title of about $3\frac{1}{2}$ acres of land.

A contest arose, whether the deposition of one Patrick Menon, now dead, should be read in evidence by the plaintiff. It appeared that the controversy had been submitted by the parties to arbitrators, about five years before, and that they had entered into arbitration bonds. The affidavit of Menon was produced to those arbitrators on the part of the plaintiff, tending to show that near fifty years before he had run the line contended for by the plaintiff, between the then owners of the land, with their consent, and had set up stakes to ascertain it, which continued standing twenty-seven years afterwards. The arbitrators desired the personal attendance of Menon before them, and when he was brought before them he deposed the same matters, and confirmed his former deposition in all its parts in the presence of the parties.

The Court were of opinion the deposition should be read to the jury. It contains what was attested by a witness, who is since dead, between the present parties, on the same question, before judges of their own choosing. Menon recognized the facts in his former deposition by his personal oath. It is certainly much stronger evidence than hearsay, which has frequently been received to establish boundary.

The Court would not permit the deposition of one John Roberts, taken under a rule of Court, to be carried out by the jury, unless by the consent of the adverse counsel. They said it had been frequently so ordered.

Witnesses are not allowed to go out with the jury on their leaving the bar, and why should depositions be treated differently? The party who has most depositions would, under a contrary practise, acquire an undue advantage.

Verdict *pro quer.*

Messrs. Rawle and Bankson, *pro quer.*

Messrs. Wilcocks and C. Smith, *pro def.*

AT NISI PRIUS, AT NEWTOWN,

MAY ASSIZES, 1794.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.RESPUBLICA *vs.* THOMAS WRIGHT.

On an indictment for uttering and publishing a forged deed, knowing the same to be forged, the party injured is a competent witness.

THE defendant was indicted for a misdemeanor in publishing and uttering a certain forged indenture between Daniel Thomas and himself, dated 5th February, 1783; the words, "but interest to be paid from the 1st April next," being therein erased, he knowing the same to be so forged and erased, with intent to defraud the said Thomas of 6*l.* 10*s.* Vid. 1. Stra. 19.

An agreement had been made and executed between the said Thomas and the defendant, for the sale of about 30 acres of land. The purchase money was to be paid by instalments, with interest on the first payment, from the first of April, 1783. These words were erased in the agreement.

Daniel Thomas was offered as a witness, but excepted to by the defendant, on the authority of 2 Haw. P. C. 433, § 24.

M'Kean, C. J. He is a competent witness; and though in the case of Dr. Dodd, a release was produced from Mr. Fletcher (the supposed obligee of the bond), to Lord Chesterfield (the supposed obligor), before his lordship was offered as a witness on the indictment for the forgery, yet this was only a prudential step in the king's counsel to avoid all dispute. How, if the law was otherwise, could there be any convictions for forgery? [Vid. Leach's crown cases, 162. 4 Burr. 2252. Dall. 111.]

Yeates, J. I am not without doubts, as to the competency of the party injured on an indictment for forgery.* The general current of the authorities, as far as I can recollect, is against it; though the line between the competency and credibility of witnesses is now much better established than formerly. [Vid. 2 Stra. 728. Hardr. 331. Leach, 10, 25, 289.]

*This point came up before the court in bank, December term, 1795, *inter Republicam vs. Robert Ross*, on an indictment for forgery, and five other counts. On full argument, the Court unanimously declared that the person attempted to be defrauded was a competent witness.

tempted to excuse himself, by observing that he could not see sufficiently to make out the copies, and had no clerk who could perform the service; but, on being threatened with an attachment by the Court, he produced the original papers. •

A dispute afterwards arose between the counsel on a point of order, who had the right of concluding to the jury; when the Court observed that the settled rule was, that whoever supported the affirmative of the issue had the right to begin and conclude. Here the *onus probandi* lay on the regulators, and therefore they were entitled to the conclusion.

Messrs. Lewis and Tilghman, *pro quer.*

Messrs. Wilcocks and Coxe, *pro def.*

ANONYMOUS.

On issuing subpoenas in cases of divorce, a rule may be made to take depositions before the return thereof.

ON motion. It was ruled, that on the 3d section of the law concerning divorces and alimony, passed 19th September, 1785 (2 Dall. St. Laws, 385), on issuing subpoenas in cases of divorce, a rule may be made to take depositions before the return thereof.

JOSEPH I. MILLER vs. JAMES GAMBLE DOWDLE.

A commission to examine witnesses executed irregularly, the witnesses not being examined to the interrogatories, depositions cannot be read in evidence.

CASE. A commission had issued for the examination of witnesses, and the return was offered in evidence by the defendant. It was objected by the plaintiff that the commission had been executed irregularly, the witnesses having been examined generally, and not to the interrogatories annexed, nor answering the all.

The Court, on inspection, declared the objection to be well founded, and that they were bound to adhere to the established forms in such cases. The admission of the present evidence would supersede the necessity or use of interrogatories, and must, therefore, be overruled.

Mr. Ingersol, *pro quer.*; Mr. J. B. M'Kean, *pro def.*

Lessee of CATHERINE M'CONNEL, *et. al.* vs. ALEXANDER PORTER.

A pre-emption warrant granted to the plaintiff in ejectment, under the act of 21st December, 1784, though he has not been on the Pine Creek lands since the commencement of the late war, shall prevail against a defendant who has not taken out his warrant until after the 1st November, 1785.

THIS cause was tried at Sunbury, May Assizes, 1793, and a verdict taken for the plaintiff, subject to the Court's opinion on the following reserved point: whether the pre-emption warrant to the plaintiff, he not having been on the Indian lands after the commencement of the war, will be sufficient to establish the title in him, the defendant not having taken out his pre-emption warrant until after the 1st November, 1785?

The facts disclosed in evidence at the trial were as follow. The lessors of the plaintiff claimed under a warrant dated 4th May, 1785, calling for John Nicholson's improvement. Nicholson settled on the lands in question in 1773, went out in the militia and left John Redick in possession, under a lease from him. Redick afterwards claimed the lands as his own, and retained possession until 1774; he was taken a prisoner by the Indians in 1777, and returned to the lands after the war and died there.

Nicholson died on his return with the militia. His eldest brother and heir at law conveyed to John M'Connel, who brought an ejectment and died. The suit was revived by his heirs the now plaintiffs.

By the Court. The words of the 10th section of the pre-emption act, passed 21st December, 1784 (2 Dall. St. Laws, 235) are express that no one shall be entitled to pre-emption of the Pine Creek lands, unless application for the same be made, and the consideration thereof tendered to the receiver general on or before the 1st November, 1785.

Under the circumstances of this case judgment must be entered for the plaintiff.

Messrs. Ingersoll, *pro quer.* Mr. Tilghman, *pro def.*

ANNE NORRIS vs. JOSEPH PILMORE.

In debt by original process against a clergyman for marrying a minor without the consent of his parents, plaintiff is entitled to costs

DEBT, by original process. The plaintiff declared that on the 1st June, 1793, at Philadelphia, she was mother of Robert Norris, the said Robert being one of the society called Friends, and under the age of 21 years; that the defendant being a person in holy orders, and minister of the Protestant Episcopal church, did then and there marry the said Robert Norris to

Anne Armstrong, without publication and without the certificate, agreement, or consent of the said Anne Norris, who then inhabited the county of Philadelphia, by which action hath accrued, &c. Plea, *nil debet* and issue.

The cause came on to be tried this term, when the jury found a verdict for the plaintiff, debt, 50*l.* with six pence damages and six pence costs.

Messrs. Moses Levy and Porter, for the defendant, now objected that the plaintiff was not entitled to costs. They contended that under the act of assembly passed 25th September, 1786 (2 Dall. St. Laws, 472, § 5), giving this Court original jurisdiction in suits within the city and county of Philadelphia, if the plaintiff shall not recover more than 50*l.* he shall not be allowed any costs of suit. Damages are recoverable in an action of debt, on account of the detention of the debt. Sayer's Law of Damages, 63. This is a suit for a penalty or forfeiture; but no duty arose until the verdict. At that instant the obligation to pay the money commenced, and therefore no damages could possibly be incurred by the detention, the same moment. A forfeiture commences from the time of conviction. 2 Bl. Com. 421. In Hullock's Law of Costs, 17, it is said that it has been repeatedly decided that in an action of debt upon any statute, by a party grieved for a certain penalty, the plaintiff shall recover costs, though none are given by the statute. But under the act of assembly on which the present suit is instituted, two persons may be said to be the parties grieved, the mother, or master of the minor married, and the party grieved remains unascertained until the verdict. It may be objected that the right is vested in the first person grieved who brings the suit; but, to this we answer by asking, if the mother here had been nonsuited, could not the master of the boy have brought his action within the time limited? If we are answered in the affirmative, as we clearly must be, it necessarily follows, that no duty was fixed until the recovery. No costs can be recovered in any action prosecuted by a common informer, except costs are expressly given by the statute inflicting the penalty. Hullock, 19. The reason is, that no person is ascertained who has a right to receive the penalty: any person may bring the action. So here, as between the mother and master, either may commence the suit on the act of assembly. The party grieved remains unascertained as much as in the case of a common informer.

Mr. Ingersoll, for the plaintiff, argued that this was a question

of positive law. The mere gist of the dispute is, whether this is the case of a common informer or of a party grieved, not whether there may not be more than one injured person. The law knows of no intermediate cases, but vests the right immediately in the party grieved, from the time of the offense committed; it does not originate with the verdict of the jury.

There is a marked distinction between actions brought by a party grieved and by a common informer. In Sayre, 71, Law of Damages, who cites Cro. Car. 559, it is laid down, that if a certain sum of money be given by a statute, by way of penalty to the party grieved by an injury, the party grieved may, in an action of debt, besides recovering the money, recover damages for the detention thereof; because the money is to be considered as a debt, it being a sum certain. But it is otherwise in the case of a common informer, who has not the least pretense of right to the money before the action was commenced. 1 Rol. Abr. 574. North vs. Musgrave.

Here the plaintiff claims under the former character, and was therefore entitled to damages for the detention of the debt of 50*l*. vested in her by law. He further cited Cowp. 407; 4 Burr. 2022; 1 Ld. Rayn. 170.

The Court took time to advise; and afterwards, in the same term, Shippen, J., pronounced the judgment of the Court, as follows:—

This was an action of debt against a clergyman for marrying an apprentice lad of eighteen years of age without the consent of his parent or master.

The act of assembly directs, that a person so offending shall forfeit the sum of 50*l*., to be recovered in any Court of Record by the *person or persons grieved*, if they will sue for the same.

This action was brought by the mother of the lad; and the jury have found a verdict for the plaintiff, with six pence damages and six pence costs.

The counsel for the defendant moved the Court that judgment should be entered for the defendant without costs. The ground of the motion is, that this action, being brought originally in the Supreme Court, and the act of assembly directing that if the plaintiff do not recover more than 50*l*., he shall not have costs, and the verdict being for the precise sum of 50*l*., no costs will follow; and although the jury have given six pence damages, yet they contend this was beyond the power of the jury to do in this kind of action, damages in an action of debt being given for the detention of the debt; but here no debt was due till the finding of the jury, so no detention. To this it was an-

swered that there is a distinction between an action brought by a common informer and one brought by a person grieved. In the latter case the debt incurs immediately upon the commission of the offense ; so damages may be well given for the detention.

To this the defendant's counsel replies, that by the words of the act of assembly, the master, as well as the parent, may be the party grieved, and therefore there is the same uncertainty as to the person entitled to the penalty, as in the case of a common informer.

We have examined the several authorities in the books upon this point. In 1 Rol. Abr. 574, it is said, where a statute gives a certain penalty to a person grieved, the debt is due on the return of the summons ; and in Cro. Car. 559, it is said to be due after demand. But neither of these cases fully answers the objection, there being in those cases, but one person who could be grieved. We have, however, looked into Henry Blackst. 10, which has given us satisfaction upon the point. That was the case of an action of debt brought for the penalty of the *habeas corpus* act, by the party grieved, against the gaol keeper, for refusing the plaintiff a copy of his warrant of commitment. A verdict was given for the penalty, but without damages or costs. On a motion that the prothonotary should tax the plaintiff's costs, and that 1s. nominal damages should be indorsed on the *postea*, the Court ruled that this was not a popular action ; but that the right rests in the party grieved as soon as the grievance is committed ; but it is otherwise in the case of a common informer, who has no interest till judgment. And on turning to the *habeas corpus* act, on which the action was brought, we find the penalty is given to the prisoner *or* party grieved, in the disjunctive. We are, therefore, of opinion, that the jury had a right to give the nominal damages, which carries the sum recovered beyond the 50*l.*, and the plaintiff must have her costs.

M'Kean, C. J., was present when the foregoing opinion was delivered, and said that, not being present when the argument was had, he did not deliver the judgment of the Court, but that he entirely concurred in it.

Absente, Yeates.

JANUARY TERM 1795.

PRESENT — M'KEAN, CHIEF JUSTICE — SHIPPEN, YATES, AND SMITH, JUSTICES.

DOMINICK JOYCE vs. JOSEPH SIMS, surviving partner.

Action will not lie by a shipper of goods, to be transported beyond sea, against the consignee of a vessel, on a disappointment of the voyage, if he knew that the vessel belonged to a foreign house; *aliter* against the owner or captain.

Consequential damages not recoverable against a consignee or factor, unless he has been grossly in fault.

ASSUMPSIT for the non-transportation of a quantity of flour to the island of Maderia.

The case was this: The defendants, under the firm of Woodrop and Joseph Sims, advertised in the public newspaper, the sailing of the brig Molly, Thomas Willes, master, to Maderia, and that persons desiring to freight, should apply to them. They subjoined hereto an advertisement of goods for sale, as wine, porter, &c.

The plaintiff applied to them, and shipped 70 barrels of flour on board the Molly, consigned to the widow Foster and sons, in Maderia, and Captain Willes signed the bill of lading on the 29th August, 1793. Freight, 7s. 6d. sterling per barrel, payable in Maderia. The vessel was the property of a foreign house, John Marsden Pintard, and it was admitted in the course of the trial, that the plaintiff knew this fact. When she fell down the river Delaware, she was levied on under a foreign attachment, at the suit of George Meade, in Delaware county, returnable to October term 1793, and afterwards sold under a rule of the Court of Common Pleas there. The flour was re-landed at Marcus Hook, and afterwards sold at public auction at a loss of 61l. 5s. 6d., exclusive of the charges of transporting the flour from thence to Philadelphia. No special undertaking on the part of Woodrop and Joseph Sims was pretended. Woodrop Sims was since dead, and the defendant survived him.

The plaintiff contended, that he was entitled to recover all consequential damages arising from the non-delivery of the flour in Maderia. It was said, this only could indemnify him.

Sed per Cur. The general rule as to damages, was settled in the case of Robert Lewis and Sons vs. Thomas Carradan, in April term, 1786, and was recognized in John Marshall vs. James Campbell and Richard Fullerton, in July term, 1791. In the present case, no consequential damages are recoverable un-

less the defendants were grossly in fault. It is otherwise with the captain, who is personally responsible from having signed the bill of lading.

The plaintiff then urged, that he was clearly entitled to recover his prime loss, and cited 1 Emerigon on Insurance, 137, 138, whoever contracts in the name of another, is liable by the custom of merchants, though the general law is otherwise; one contracting for freight, though he declares his principal, is held liable by the customs of France.

For the defendant it was argued, that this was a matter of great public commercial consequence, and must be determined on general legal principles. No merchant would be safe, if when he received the consignment of a vessel, he was to be responsible for the laches or default of his principal. The general rule is, that a broker or factor acting for his principal, with authority, is not answerable, unless there is a special undertaking, 3 Wms. 279. The observations from Emerigon show the law to be otherwise than is urged for the plaintiff, and in the instance there put, of the party contracting for freight, and declaring his principal, his responsibility depended on his particular personal engagement.

Per Cur. The general rule is clearly as the defendant's counsel have laid it down. If the plaintiff, when he shipped the flour, knew that the vessel belonged to Pintard, it is equivalent to the defendant's declaring his principal at the time of shipment, and no action in such a case would lie against the factor. [Vid. 2 Vez. 22.]

If the plaintiff did not place his reliance on the owner or captain of the vessel, he should have required a personal engagement from the consignees; but not having done so, his remedy is against the two former, and not against the latter, whom he only knew in the capacity of factors. The conjoining the sale of the defendant's goods in the same advertisement with the freight of the Molly, proves nothing; since we all know that such things are customary in trade, to save expense. We therefore think the present suit not sustainable.

The jury gave a verdict for the defendant without leaving the bar.

Mr. Heatley, *pro quer.*

Messrs. Wilcocks and Rawle, *pro def.*

LESSEE of RICHARD CHEESMAN vs. ABRAHAM WILT.*

Devise of lands to J. and S., their heirs and assigns. Provided, always, if they shall die under age *and* without issue, then remainders over; these remainders only can take place on the happening of both contingencies — their dying under age, and without issue.

Where the Court have no doubts, they will not reserve a point, nor direct a verdict to be entered *pro quer.*, subject to this reserved point, where their opinions are for the defendant.

EJECTMENT for a lot of ground in the city of Philadelphia.

The question turned on the last will of James Parrock, dated 24th May, 1754, who, it was admitted, died seized of the premises. He therein (*inter alia*), devised all the rest and residue of his real and personal estate to his grand children, John Parrock and Sarah Parrock, their heirs and assigns. "Provided, always, the legacies hereinbefore devised to the said John and Sarah are upon this special condition, that if both my said grand children *shall happen to die under age, and without any lawful issue*, then it is my will that one-fourth part of all and singular the real and personal estate to them before devised, shall go to the monthly meeting of the people called Quakers, and the other three-fourth parts to be equally divided between Sarah Smallwood and the children of John Smallwood and Thomas Smallwood, the children of Benjamin Richards, and of William Paschall, Sarah Paschall, Lydia Cathcart, and her children, Joseph Fordham and his children, Richard Fordham and his children, the children of Isaac Ashton, Sarah Thomas and her children, Mary Lee and her children, Lydia Davis and her children, John Spencer and his children, and to the survivor of them, and to the heirs and assigns of such survivors or survivor, as tenants in common forever."

Both the grand children, John Parrock and Sarah Parrock, died of full age, but without issue.

Sarah Smallwood died intestate, leaving eight children, under whom the lessor of the plaintiff claimed.

Mesars. Rawle and Thomas, for the plaintiff. We contend that it was the true intention of the testator, upon the construction of the whole will, that the remainders over should take effect, in case either of the grand children died without issue, though they attained their full ages. A Court of justice may construe a will, and from what is expressed, necessarily *imply* an intent not particularly specified in words. 3 Burr. 1634.

The Court have the same power over the word *and* as *or*. There is no magic in particular words, further than as they show the intention of the parties. Where there is no doubt on the intention of the parties, and where the sense requires it, there are many cases to show that we may construe *or* into *and*,

*See page 332.

and *and* into *or*. 3 Term Rep. 473. Devise of leasehold lands after the death of his wife, to his son, R., for his so many years, &c., if then living, but if then living *and* should then or hereafter have issue male, to him absolutely, otherwise over. R. died in the life of the wife, leaving a son; *and* shall be construed *or*, and the leasehold belongs to the representative of R. 1 Vez. 217; S. P. Co. Lit. 225, *a*. So in a promissory note, *or* held to be synonymous to *and*. Cowp. 832.

Messrs. Lewis, Wilcocks, and Tilghman, for the defendant. The true intention of the testator can only be collected from the words of his will. Without doing violence to the clear expressions of it, the remainders over can only take effect on both events taking place, viz: the grand children dying under age, *and* without lawful issue. • Such has been the adjudications in a variety of cases, where the words of *wills* might at first sight bear a different construction.

"I give the premises to my grandson, his heirs and assigns, but in case he dies before twenty-one *or* marriage, *and* without issue, then to S." The grandson attained twenty-one, and died, having never been married. The word *or* was construed as *and*, and held that all put together was in nature of one contingency. It was deemed considerable that it was not a condition precedent, but to destroy an estate devised by the former words in fee. 2 Stra. 1175, *Barker vs. Suretees*.

One devises lands to his son and his heirs, and in case his son dies before twenty-one, *or* have issue of his body living, then to F. The son lives to twenty-eight years of age, but dies without issue; F. shall not have the land. Pollex. 645, *Price vs. Hunt*. Devise to his son and his heirs, and if he dies within age, *or* without issue, remainder over. The devisee had issue, but died under age; the issue shall have the land, and not the remainder man. Cro. El. 525; Moor. 422, *Soulle vs. Gerrard*. Devise to A., his heirs, and assigns forever, but in case he dies before twenty-one, *or* without issue, then to testator's wife, her heirs and assigns. This was held to be a vested estate, in fee, in the son, as he attained twenty-one, and though he died without issue, that it did not go over to the mother, but descended on his heir at law. 3 Atky. 193, *Walsh vs. Peterson*.

One devises his house to R., his heirs and assigns forever, and in case he shall happen to die in his minority *and* unmarried, *or* without issue, remainder to N. and his heirs; the estate vested in R. when he came of age. 3 Atky. 390, *Framlingham vs. Brand*.

Under a devise to A and his heirs forever, paying to B 20*l*. and if A die without issue living O, then O shall have the land, paying the same sum as A should have paid, A takes an estate

in fee simple. Cro. Jac. 590. *Pell vs. Brown*. Devise to A, and if he die without issue that this shall remain to B, is tail; but it is not so if his death without issue be limited within a certain time, as before 24 years of age, or in the life of another. Moor. 464. 8 Vin. Abr. 240, pl. 4, *Bacon vs. Hill*.

The counsel then contested in what shape the verdict should be given. The plaintiff insisted that there should be a verdict for the plaintiff, subject to the point reserved on the legal operation of the words of the will; the defendant contended that there should be a verdict *pro def.*, and the plaintiff might, if he thought proper, move for a new trial.

Per Curiam. The present case is extremely clear, and would have been deemed so before the resolution in *Soulle vs. Gerrard*, Temp. Eliz. Where the words of a will are plain, the intent always follows the words. (See 2 And. 17. 4 Burr. 2246. 5 Bac. Abr. 525.)

It is true, the intent of a devisor may be implied where the words are defective, but not against the words of the will. [Moor. 464.] We cannot from arbitrary conjecture, though founded on the highest degree of probability, add to a will, or supply the omissions. [3 Burr. 1634.] We should do manifest violence to the testator's expressions, if we did not say, that the remainders over could only take place on the happening of both contingencies,—the grand children who were the primary devisees dying under age, *and* without issue.

The cases cited by the plaintiff's counsel go very far to show what would have been the legal construction, if the testator had made use of the disjunctive, "or" instead of the conjunctive "and." But as the will before us is penned, there can be no possible doubt.

As to the manner of taking the verdict: The practise certainly is, where a point is reserved, the verdict should be entered for the plaintiff (2 Barnes, 366. *Kemp vs. Strafford, et al.*). But where the whole Court have no doubts or difficulties, we could not easily be prevailed on to direct a verdict against the settled judgment of our minds. The verdict should therefore be given for the defendant, and if the plaintiff is dissatisfied with our opinion, he may move the Court for a rule to show cause why a new trial should not be had.

The jury gave a verdict for the defendant without leaving the bar.

JOHN WARDER, who survived JOHN DEARMAN, *vs.* WILLIAM CRAIG.

Qu. Whether an English merchant can recover for premiums on insurance of goods shipped, where the same has been ordered, unless he produces the policies or accounts for their loss?

CASE. The plaintiff claimed of the defendant a balance of 137*l.* 3*s.* 1*d.* sterling, on an account for goods shipped from London, commencing in 1783.

The defendant disputed several items of the account, and amongst others, the charges of premiums on insurances made on several shipments, unless the policies were produced. He admitted that the law in this case rested on the general rule of trade, but contended that to entitle the party to charge and recover the premiums, it should appear that the policies were subscribed. If they existed, they should be produced; if proved to be lost, copies or parol evidence of their contents would be received. He cited Dall. 316. *Williams vs. Craig*, as expressly in point.

The plaintiff adduced six witnesses to prove that the general established usage was, that the London merchants charged insurance on goods shipped to America, where insurance was ordered, and regularly subjoined them to their accounts; that they usually took the risk on themselves, or at least part thereof; in some instances policies were subscribed, but in many others not, and that no jury could arise to the American merchant, because if the goods did not arrive safely, there could be no recovery against him.

The plaintiff cited 2 Vez. 239. In a transaction between merchants in different countries, one sends to the other to insure, who pretends to do it, and charges his correspondent as if done, he shall, after a loss happens, be charged as the insurer.

This case is distinguished from that of *Williams vs. Craig*. There was no established rule of trade between France and Philadelphia. Our trade with that country began and ended with the American war. But between England and Philadelphia a settled rule had subsisted for many years, and the usage had been generally approved of. The plaintiff's charge for insurance was contained in every account rendered to the defendant; and as he made no objection thereto, he must necessarily be supposed to have acquiesced in the custom of the English merchants.

The Chief Justice at first seemed inclined to think that to entitle the plaintiff to charge for the premiums of insurance, it should appear by a production of the policies that they were actually subscribed, or their loss should be accounted for; otherwise, tricks might be played. Besides there may be many cases

where a merchant might employ a factor to ship him goods, whom he might not deem competent as an assurer.

Shippen, J., thought differently on the grounds of the English mercantile custom, and the responsibility of the party who does not make the insurance according to order.

But no resolution was given by the Court, and the parties finally agreed to go out with the jury to liquidate the whole account. The jury, next morning, returned into Court, and found a verdict for the plaintiff for 247*l.* 5*s.* 8*d.* currency, validating thereby, as it would seem, the charges of premiums.

Quære. Whether any injury can possibly arise under the above usage in any case where the goods are shipped on credit?

Mr. Rawle, for the plaintiff.

Messrs. Tilghman and Wells, for the defendant.

REPUBLICA vs. JOSEPH LANGCAKE and JOHN HOOK.

Under the 6th section of the act of assembly of 22d April, 1794, "for the better preventing of crimes," in order to convict on the first clause, there need only be a general intent to maim and disfigure; but on the second clause, there must be a particular intent to put out the eye. What the legal sense of the word *malice*.

The malice and lying in wait need not be expressly proved, but may be collected from all the circumstances of the case.

The declarations of a deceased person shortly before his death, who had been bound over to answer to a charge of maihem, cannot be given in evidence by the other defendant.

INDICTMENT for maihem and assault and battery, removed by the defendants from the Court of Oyer and Terminer for Philadelphia county.

The indictment consisted of four counts, the first two being under the act of assembly passed on the 22d April, 1794.

The first count stated that Langcake, contriving and intending Jonathan Carmalt, a citizen of Pennsylvania, to maim and disfigure, with force and arms, &c., on purpose and of his malice aforethought, *and by lying in wait* on the 13th August, 1794, at, &c., unlawfully and feloniously did make an assault on the said Jonathan with a cart whip of the value of 1*s.*, and the right eye of the said Jonathan, then and there did strike and put out, with an intent, in so doing, to maim and disfigure him, against the act of assembly, &c., and that Hook was then and there present, aiding and abetting the fact, &c., against the act, &c.

The second count was grounded on the latter part of the 6th section of the act of 22d April, 1794 (p. 601), and pursued the words of the first count, leaving out the words, "and by lying in wait," and charging the fact to have been done "voluntarily, and maliciously, and of purpose," both against the principal and accessory.

The third count stated that Langcake and Hook, contriving to maim and disfigure Jonathan Carmalt, in the peace of God and of the commonwealth then and there being, the said Langcake, on the 13th August, 1794, at, &c., voluntarily, wickedly, maliciously, unlawfully, and feloniously, did assault the said Jonathan, and him with a cart whip, which he in his right hand had and held, the right eye of the said Jonathan, then and there voluntarily, &c., did strike and put out, with intent in so doing, to maim and disfigure him, and that Hook, at the time of the felony by Langcake, done and committed voluntarily, &c., was present, aiding and abetting the said Langcake in the felony aforesaid, concluding, as in maihem at common law, against the peace, &c.

The fourth count was a general charge against both defendants of assault, battery, and wounding, at common law.

The defendants were admitted to their challenges of the jurors returned, under the 16th section of the act of assembly, and joined in their challenges. The evidence on the part of the commonwealth disclosed a great variety of aggravated circumstances against the defendant, Langcake. Hook was his apprentice, and was supposed to have acted by his command. But one Thomas Langcake, the father of the defendant, Langcake, appeared to have been very active in the atrocities committed, and had been recognized with the others to answer the charge. He had died before the time of finding the indictment in the Court of Oyer and Terminer, and his declarations shortly before his death were now offered in evidence by the counsel for the defendants.

They urged that the declarations of a dying person were deemed equivalent to an oath, and had been frequently received on the trials of indictments for murder; that the prosecutor, being entitled under the act of assembly to three-fourth parts of the fine, to be assessed by the Court on conviction, would probably be induced to state the facts in their strongest colors, and therefore any evidence tending to invalidate his testimony, though as to collateral matters, ought liberally to be received; and that Thomas Langcake, if not indicted and living, would certainly be a witness either for or against the prosecution.

But the whole Court resolved that these declarations could not be received in evidence. The general rule was, that hearsay was inadmissible, but there were some exceptions in particular cases, and, among others, the declarations of the deceased person on an indictment for murder, founded principally on the necessity

of the case. No such necessity could be pretended here, there having been several witnesses present at the different transactions. It would lie on the defendants to establish the evidence contended for, as an exception from the general rule, which cannot be done.

But independent hereof Thomas Langcake was bound over to answer the charge. His mind must have been impressed therewith, and he would naturally make his story as plausible as he could. A considerable weight of testimony appears against him, and the grand jury would, in all human probability, have found a bill against him, if he had been then living. If indicted and alive, Thomas Langcake could not be admitted a witness to disprove the present charge, his declarations shortly before his death surely cannot be received in evidence, and are consequently overruled.

The cause was very ably and ingeniously argued by Messrs. Thomas and Porter, on the part of the state (Mr. Ingersol, the attorney general, being sick), and by Messrs. Rawle and Moses Levy on the part of the defendants, and M'Kean, C. J., having explained the different counts in the indictment, and summed up the evidence to the jury, delivered to them the charge of the Court.

To convict the defendants of the first three counts, *malice* must be proved or collected from the whole circumstances of the case. The defendants may express it either by their words or actions. This word has been differently explained by different law writers, but it is clearly agreed that *malice* in a legal sense is not to be restrained "*to a principle of malevolence to particulars,*" according to the modern use of the word. 1 Hawk. 80, § 18; Fost. 256. Malice is a design formed of doing mischief to another. Kely. 127. He that doth a cruel act voluntarily, doth it of malice prepensed. 3 Inst. 62. Such cases as are accompanied with those circumstances that show the heart to be perversely wicked, are classed as malicious. 1 Haw. 80, § 18. An express evil design is the genuine sense of *malitia*. 4 Bl. Com. 199. All the cases of implied malice turn upon this simple point, that the fact hath been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent upon mischief. Fost. 257. These expressions, however diversified, clearly evince that those acts shall be deemed malicious where the attendant circumstances are the ordinary symptoms of a wicked, depraved, malignant spirit. Fost. 256.

The first clause of our act of assembly, of 22d April, 1784, § 6, is borrowed from the words of the British statute, of 22d and

23d Car; 2, c. 1, § 7. It pursues the same language, except that our act particularly enumerates the cutting off "the ear," and mildly varies the mode of punishment. Under that statute, commonly called the Coventry act, it has been adjudged not necessary that either the malice aforethought, or lying in wait, should be expressly proved to be on purpose to maim or disfigure. Leach's Cas. 193. (Tickner's case.) And also that he who intends to do this kind of mischief to another, and *by deliberately watching an opportunity*, carries that intention into execution, may be said to *lie in wait on purpose*. Ib. 194 (Mills's case).

Under the first clause of the act of assembly, no intent to maim or disfigure in a *particular* manner is necessary, and therefore, on the first count in the indictment, if the general intent is established to the satisfaction of the jury, their next material inquiries will be as to the malice and lying in wait, whether the same have been proved, or can fairly be inferred, from all the circumstances which have been disclosed in evidence.

The second clause of the 6th section of the act goes further than the Coventry act, and was evidently introduced to prevent the infamous practise of *gouging*. The words are very comprehensive, and extend to pulling out, or putting out the eye, while fighting or otherwise. But we hold it necessary in order to convict on this clause, that a specific intent to pull out, or put out the eye, must be shown to the satisfaction of the jury. We apprehend that the evidence will scarcely warrant the conviction of Langcake on the second count; and though Hook has behaved himself grossly amiss during the whole transaction, yet he cannot properly be convicted on either of the first two counts in the indictment.

Of the third and fourth counts, Langcake is *admitted by his counsel to be guilty*,* and perhaps the evidence will suffice to reach Hook on these last two counts.

But it is the duty of the jury to consider and weigh all the testimony, as to each of the defendants on the different charges, and pronounce such verdicts as may be satisfactory to their own consciences.

The jury withdrew, and returned to the bar in about one hour, and found Langcake guilty, on the first, third, and fourth counts, and not guilty on the second count. They acquitted Hook of the first and second counts, and convicted him of the two last counts.

Sentence was afterwards pronounced against Langcake that he should undergo a confinement in the jail and penitentiary house for three years, the one-twelfth part to be in the solitary

*A mistake.

cells, to pay a fine of 1,000 dollars, whereof three-fourth parts to be for the use of Carmalt, and give security for his good behavior for seven years, himself in 500*l.* and two sufficient sureties in 250*l.* each, and pay costs.

Hook was imprisoned for three months, fined one dollar, and to pay the costs of prosecution.

RES PUBLICA vs. DANIEL MONTGOMERY, esq.

Information will lie against a justice of the peace for not actively assisting in suppressing a riot. It is the duty of every citizen to endeavor to suppress a riot, and when the rioters are engaged in treasonable practises, the law protects other persons in repelling them by force.

A RULE had been granted on the defendant, a justice of the peace of Northumberland county, to show cause why an information should not be filed against him for misdemeanor in office founded on the affidavits of William Wilson and John M'Pherson, esquires, two of the judges of the Court of Common Pleas of the said county. The substance of these affidavits was as follows :

After the militia had marched from Philadelphia, to suppress the insurrection in the western counties of the state, on the 30th September, 1794, the deponents hearing that some ill-disposed persons were about to erect a liberty pole (falsely so called) in the town of Northumberland, determined to prevent it if possible. They called on Mr. Montgomery, and desired him to go with them for that purpose; he answered: "The people were determined to have their grievances redressed, and would erect the pole; and for his part he would put to his shoulder to lift or pull at the rope, if required by the people." He however went reluctantly with them to where the rioters were assembled but rendered them no assistance in preserving the peace, and shortly after disappeared. An affray took place between one of the rioters and a friend to good order, and some blows passed. Mr. Wilson read what he called the *riot act*, to induce the multitude to disperse, but they refused. One of them presented a musket at him, and he presented his pistol also. On the 15th of November following Wilson was arrested under two warrants, issued by Montgomery, for supposed assaults, while he was exerting himself to suppress the riot and prevent the erection of the pole. Being brought before the justice he alleged that what he had done was in the prosecution of his duty, and therefore declined giving bail, and offered to go to jail. After some altercation he was dismissed, Montgomery saying, things must remain as they were.

Cause was now shown by Mr. Moses Levy, who produced the

affidavit of Flavel Rowan, esq., late sheriff of Northumberland county, tending to prove, that the defendant appeared to concur with Wilson and M'Pherson, as to the suppression of the riot, except as to reading of the riot act, and seemed desirous of preserving the peace. He also read the affidavit of the defendant himself, that William Hoffman and William Cool had severally complained of assaults committed by Mr. Wilson on them on the 30th September, and that he had declined issuing process thereon at first, but at length issued his warrants and discharged Wilson on his being brought before him. He annexed thereto the depositions of Hoffman and Cool: the former swore that Wilson presented a pistol at him; the latter, that Wilson forcibly seized him, while Jasper Ewing, esq., the prothonotary of the county, snapped or attempted to snap a pistol against him. These depositions were taken on the 15th of November, 1794.

It was urged, that though under the 10th section of the 9th article of the state constitution, informations would lie for oppression and misdemeanors in office, yet the Court would exercise their leave of procedure in this way warily and cautiously. The law should not be strained, unless the proofs were clear. Informations would not be granted in England for errors in judgment, or for irregularity, where the heart and intention were pure. 1 Burr. 556. 2 Burr. 722, 1162. Every citizen had a right "to the free communication of his thoughts and opinions" while his views were upright; and it was difficult to draw the line, when "the abuse of that liberty" should be said to begin, and the first tinge of criminality appear. It was essential to the freedom of a republic, that people should speak their minds on laws and all public transactions, and their conduct in this particular should not be scanned too nicely. The mere erection of a liberty pole was innocent in itself; and while the minds of the multitude were bent in that direction, the defendant might perceive the inutility as well as danger of opposing their avowed purpose. He might feel his nerves not sufficiently strong to oppose the torrent; and under an *imperious necessity* might possibly have said, he would assist the people in their darling object if required. His judgment was imposed on; he did not *foresee* the dangers of those erections, which public events have since developed; but he is not to be punished for want of *foresight*.

As to the defendant issuing his warrants against Mr. Wilson, he did no more than his duty. He was not present when all the violences took place on the 30th September. The complainants were sworn to the truth of the charges and required process;

he could not refuse it in the line of his office. What right had any one to snap a pistol against a peaceable man? What right had any judge to hold him at this period of danger?

Per Curiam. It is the duty of every good citizen to endeavor to suppress a riot; and when he finds a mistaken multitude engaged in treasonable practises, to the subversion of all peace and good order, he is protected by law in coming forward with other well disposed characters, to repel them by force.

Mr. Thomas, *e contra*, on the part of the state. The proofs are here sufficiently clear to warrant an information. Though freedom of speech is secured to us by the constitution, yet we are responsible for an abuse of that liberty. The people may meet and discourse on public measures, and the public mind may thus be illustrated and informed; but if they meet for *sedition* purposes, or when met, go into seditious resolutions, they are amenable to the law. Credulity itself could not be brought to believe that the defendant, a justice of the peace, was ignorant of the transactions in the western counties, or of the traitorous insurrections existing there, so far back as the month of July. The resolves at Pittsburg, Parkinson's Ferry, and Brad-dock's Fields, had been published; the proclamations of the president of the United States; his mission, and that of the governor of this commonwealth, to the insurgents; the state laws passed on the alarming occasion; and the actual march of the militia were universally known. Could the defendant be so unconscions of his duty, as not to feel that his oath of office required of him his honest endeavors to preserve the peace, suppress riots, and prevent the erection of liberty poles, "the avowed standards of rebellion?" Has he rendered his assistance in support of good order? It is not pretended by his own affidavit, which is silent as to several of the charges adduced against him. If his conduct arose from *weak nerves*, or an *imperious necessity*, he would fairly have declared so upon oath; but his expressions show that his errors were not confined to his head; they reached his heart; and, at the time of the riot, he could not have been considered as even a *neutral* character. As to issuing his warrants, it more probably arose from a desire to screen the rioters or himself, and deter prosecutions, than a sense of duty, and the advancement of public justice. He could not but know that Mr. Wilson's efforts were in support of the laws and good government; and though the supposed assaults happened on the 30th September, yet, no prosecutions are originated until the 15th November following.

with more solemnity than that of a deed, and the heir has been decreed to join, that the lands might sell at their full value. 3 P. Willms. 93. 2 Vern. 99. 1 Cha. Ca. 262. 1 Atky. 420, 421.

Per Curiam una voce. The sale by the surviving executor is valid. Let judgment be entered for the plaintiff.

Mr. Bankson, for the defendant, did not argue the cause.

Lessee of WILLIAM EVANS *vs.* JAMES WEBB.

Devise by testator to his wife, not expressed to be in lieu of her dower, and where her claim of dower is not inconsistent with, or in contradiction to, the will, the widow is entitled to her dower at common law.

A devisee may recover in ejectment in such a case against the widow, without previously assigning her dower.

THIS cause came before M'Kean, C. J., and Yeates, J., for their opinion, at Lancaster, May assizes, 1794, on a case stated as follows:—

Isaac Evans made his will, dated 29th November, 1781, and after bequeathing a few specific articles to his wife, Anne, gives to his said wife, Anne, during her widowhood, the front room of the house wherein he then lived, the small cellar under the kitchen, and the common use of the kitchen, oven, and draw-well, and the privilege of passing and re-passing to and from every of the same. He then gives to his said wife, in consideration of her schooling and well educating his children, the rents, issues, and profits of all his lands, from the time of his decease until his sons arrive to their respective ages to possess the same. He then directs that his son William (the lessor of the plaintiff) or any other person that shall enjoy the house and premises wherein he then lived, shall keep for his said wife one horse and cow, and provide her sufficient firewood during her widowhood. He gives to his daughters, Mary, Hannah, Sarah Anne, and Susannah, 150*l.* each, the two former payable in one year after his decease, and the three latter when the respective legatees should arrive at the age of 18 years. He gives to his son John 250*l.*, payable at 21, and directs that he should be put to a trade when he should be 15 years old. He then orders that his land should be divided in a certain manner into two shares, and devises one part thereof to his son Isaac in fee, and the other part thereof to his son William in fee, when they should respectively arrive at the ages of 21 years, with certain limitations in case they, or either of them, should die in their minority, and without lawful issue. He appoints his said wife, Anne, executrix of his will, and directs that she shall take all his personal estate at a moderate valuation, to be made as soon as conveniently might be after his decease, and pay all his legacies;

and if an overplus should appear in her hands on a settlement, that then she shall divide the same equally to and amongst all his surviving children, when the youngest should arrive at the age of 18 years, without interest.

Anne Evans proved the will, and took out letters testamentary on the 11th May, 1782, and afterwards married James Webb, the defendant. He continued in possession of part of the premises, devised to William Evans after the said William became of age, and held the same under his wife's claim of dower.

It was agreed that judgment should be entered for the plaintiff, subject to the opinion of the judges at *Nisi Prius*, whether under the will aforesaid, the widow of the said Isaac Evans, was entitled to dower, and if so, whether William Evans the devisee of part of his lands, could recover in ejectment against her, without previously assigning her dower.

The case was argued at *Nisi Prius* at Lancaster, by Mr. Hopkins, for the plaintiff, and by Mr. C. Smith, for the defendants; but as their arguments are noticed by the Court, it seems unnecessary to detail them.

The Court took time to advise. And now in bank, the Chief Justice desired Yeates, J. to pronounce their opinion, which he did as follows, after stating the case.

The first point, whether Mrs. Webb was not entitled to dower, was not insisted on by the plaintiff's counsel on the argument. It must be observed, that the devise to the widow of Isaac Evans, is not expressed to be in lieu of her dower, nor can such intention to bar her of dower, be certainly collected from the whole of the will. A doubt once existed, whether if the wife took a *larger estate* under the will, than her dower, though not said to be in lieu of dower, it should not go in ademption thereof; yet since the case of *Lawrence vs. Lawrence*, where Lord Somers's decree was reversed by the lord keeper, and the reversal affirmed in the House of Lords, that doubt has ceased. 1 Equ. Cas. Ab. 218. 2 Atky. 427. 3 Atky. 8. This case is not nearly so strong against the widow as that of *Kennedy vs. Nedrow*, and wife, *et al.* Dall. 415, where it was adjudged that the demandant was entitled to dower. The claim of the defendant in right of his wife, is not inconsistent with, or in contradiction to the will, and may be fairly distinguished from the cases, *Arnold vs. Kempstead*, Ambl. 466, *Villareal vs. Lord Galway*, Ib. 682, and *Jones vs. Collier et al.* Ib. 730. We are therefore of opinion, that the defendant in right of his wife, is entitled to dower in the premises.

On the second point, it seems very clear from the books, that a woman entitled to dower cannot enter on the lands of her hus-

band until it be assigned to her, and set out either by the heir, terre tenant, or sheriff, in certainty. Co. Lit. 32, b. 34, b. 37, a. Hargr. note 1, ib. 1 Rol. Ab. 681. Dy. 76, b. Plowd. 529. Bro. Dower, pl. 16. *Scire Facias*, pl. 36. 2 Bac. Ab. 134. If she even recovers dower of the lands, she cannot enter before execution is sued. Nor if the recovery be of a rent, though there it is certain enough. 1 Rol. Ab. 681. S. pl. 1, 2. 9 Vin. Ab. 252. 40 Ed. 3, 22. 45 Ed. 3, 5, b. On the most minute search we have been able to make, we cannot find any case, wherein it is laid down that the widow may legally enter on the lands of her dower at common law.

But a distinction was contended for by the defendant's counsel, that though the widow could not justify her entry against the heir or devisee, yet such heir or devisee could not recover against her, when in possession, as defendant in ejectment. We can see no ground whatever for the distinction. For if she could hold adverse to the heir or devisee, without an assignment of dower, she could also maintain ejectment to recover such possession.

The testator's devise to the widow during the minority of the children, can effect no difference. At common law, she was entitled to her quarentine of 40 days; but if during that time, dower is not assigned to her, she must compel it by writ. Co. Lit. 34, b. "And therefore," says Lord Coke, "to the end that widows *might enter*, and not be driven to suit, the law hath provided dower *ad ostium ecclesie*, and *ex assensu patris*, and lastly by making a jointure." Ibid.

The words of Mr. Justice Gould, in 3 Wils. 519, have been relied on. He there says. "If dower be not assigned to the widow within 40 days, may she not continue until it be assigned to her? I think the Court would not turn her out, until dower was assigned to her."

These were his expressions on the first breaking of the case; but however humane the sentiment was, we find he afterwards relinquished the position, as untenable. For Lord Chief Justice De Grey, in delivering the sentiment of the whole Court, says, "If the mother had entered for her dower, when it was not assigned to her, it would have been a disseisin." And the very ground of the plaintiff's recovery, as heir at law to the infant son, was, that "the possession of the mother and the daughters was the possession of the daughters, and when the son was born, the estate was divested out of the daughters, and not before; then the son was in actual possession and seisin of the premises by his mother, who had a right to the possession as being his guardian by law, though not assigned as such."

Hence it appears that the case of *Newman's lessee vs. Newman*, so far from operating against the plaintiff's claim in the suit before us, strongly establishes the old doctrine; and we can only say, with Lord Chief Justice De Grey, "If the law be so, we cannot determine to the contrary upon inconvenience, or the hardship of the law." 3 Wils. 522. We also understand that this very point was lately determined in the same manner by our brethren, Justices Shippen and Smith, at the last assizes in Franklin county, in the case of the lessee of *Robert Mahan vs. Charles Kelly*.

On the whole, we are fully of opinion that judgment should be entered for the plaintiff.

RICHARD ROE, lessee of CLKMENT HUMPHREYS, JOSHUA HUMPHREYS, and HANNAH HUMPHREYS, vs. JACOB HUMPHREYS.

All possible contingent titles in lands, accompanied with a real interest, may be seized in execution and sold by the sheriff.

It is not necessary to hold inquisitions on estates for life, or reversions or remainders previous to a sale by the sheriff.

EJECTMENT for lands in Delaware county, tried at the last May assizes, at Chester, before M'Kean, C. J., and Yeates, J. A verdict had passed for the plaintiff, but a point was reserved at the instance of the defendant's counsel. The case was: Edward Humphreys, being seized of the premises in question, by will dated September 20th, 1774, devised the same "to his sisters, Elizabeth and Rebecca, during their lives, remainder to his nephew, Jacob Humphreys (the defendant) during life, and the heirs of his body lawfully begotten, and, in default of such heirs, to his nephew, Clement Humphreys" (one of the lessors of the plaintiff) "in fee simple."

Rebecca, one of the devisees for life, survived her sister, Elizabeth, and died February 2d, 1790. During the life of Rebecca, a judgment was obtained against the now defendant, and the premises seized in execution, and were afterwards sold and conveyed by William Gibbons, esquire, sheriff, to the lessors of the plaintiff, for 50*l.* on the 31st May, 1786. The sheriff's deed recited the life estate of Rebecca, and conveyed all the interest of the defendant to the purchasers. A fulling mill and other improvements were on the lands. No inquisition was recited in the sheriff's deed.

Messrs. Rawle, Moses Levy, and J. B. M'Kean, now contended that the sale was invalid, no inquest having found that the lands were insufficient to pay the damages and costs, within seven years. This was necessary by the act of 4th Annæ (1 St.

Laws, 49, 50), the words of which are, "It shall not be lawful for any sheriff, or other officer, to sell any such lands, *tenements*, or hereditaments, which shall, or may, yield any yearly rents or profit, beyond all reprises, sufficient to pay within the space of seven years, the debts or damages, with costs," &c. If a contrary doctrine should be established, a dry reversion of the greatest value might be sold for the most inconsiderable sum, without any previous inquiry.

They further contended that the defendant's interest in these lands was a mere contingency, and that an estate in lands in *possession* was only contemplated by the legislature as liable to sale. They admitted that their construction was not confined to the *actual* possession of lands, but only to the *legal* possession. The intention of the law may be inferred from the 2d section of the act of 4 Annæ, which directs, that the lands which shall be found sufficient to pay within the term of seven years, the debts and costs, shall be *delivered* to the plaintiff, until the debts and costs be levied by a reasonable extent; and from the fourth section of the same act, which declares that the lands sold or delivered shall be quietly and peaceably *held* and *enjoyed* by the persons to whom the same shall be sold or delivered, as fully and amply as the original party might, could, or ought to do, at or before the taking thereof in execution. It is a well known rule, that statutes derogating from the common law must be construed strictly.

But the peculiar hardship of this case rests in this—that though the sheriff's deed affects to give the purchasers the mere life estate of the defendant, yet it actually strips him of an estate of inheritance. For if he could now make a good tenant to the præcipe, he might vest himself with an estate in fee simple by suffering a common recovery, and thereby possibly procure 1700*l.* or 1800*l.* for the lands, which have been sold by the sheriff for the paltry sum of 50*l.*

The old notion was, and in even Lord Coke's time, that a tenant in tail could not convey an estate longer than for his own life. But it is now settled that a release, or bargain and sale, gives a base fee—a defeasible estate voidable by the issue in tail. 3 Burr. 1705. 10 Co. 95, *b.*

Messrs. Wilcocks and Thomas, for the plaintiff.

The first objection made, the want of inquisition, has been newly picked up. It was not the point reserved at *Nisi Prius*. But it admits of a ready answer. For it has been often held, that it is not necessary to hold inquisitions in the case where life estates have been seized in execution, because of the uncertainty

of their duration; and the same principle extends to reversions and remainders where they depend on life estates, because no one can ascertain the period of their commencement, and the creditor is not obliged to wait for his debts, until the determination of the *particular* estate. Which was fully admitted by the whole Court.

The defendant took under the will a vested interest, more than a mere contingency. A devise to J of certain lands, when he arrives at the age of 21 years has been adjudged to be an immediate gift to him, though he is not to have the possession until he comes of age. Dall. 176, 177. A contingent interest or possibility in a bankrupt, is assignable by the commissioners. 3 Wms. 132. Even an executory devise, and therefore a possibility accompanied with an interest, has been adjudged to be transmissible, assignable, descendable, and devisable. 3 Term Rep. 93 to 98. And Ashurst J. (Ib. 95) calls such a contingency an "hereditament," one of the terms used in our act of assembly. There is no obscurity in the penning of the act, *reddendo singula singulis*. Reversions and remainders cannot be the subjects of extents: no inquisitions are necessary when they are seized on, and therefore they cannot be *delivered* to the party. But a purchaser may *hold and enjoy* such estates as fully and amply as the debtors themselves might or could have done, before they vested in possession. The words of the act are sufficiently extensive to reach such a case.

By the Court. This may possibly be a hard case, but we cannot help it. The words* "lands, tenements and hereditaments" mentioned in the act of 4 Ann. will surely comprehend the defendant's interest in these lands before the life estates fell in, and such has been the uniform usage under it. The law was made to answer the purposes of a commercial people, and to secure the payment of just debts, and meant to comprehend all possible titles, contingent or otherwise, in lands, where there was a *real interest*, but not such as that of an heir apparent. If a different construction prevailed, any one by carving his real property into estates tail, might protect them against his children's debts. It may also be remarked, that though the purchasers

* Reversions are comprised under the name of "lands." Gilb. Executions, 39. "Tenements" signify any thing of a permanent nature that may be holden. 2 Bl. Com. 16. The words "lands and tenements" in a deed, will pass reversions. Perk. Sect. 414.

Whatever may be inherited is a "hereditament," be it corporeal or incorporeal, real or personal or mixed. Co. Lit. 6 a, 2 Bl. Com. 16. A rectory will pass by the word "hereditament." Moor. 176. So of an advowson. Dy. 323. b. pl. 30.

have got a good bargain, yet it might have so happened, that by the defendant's dying before the first two devisees for life, they might have lost their money.*

Judgment *pro quer per tot, Curiam.*

The PRESIDENT and MANAGERS of the Delaware and Schuylkill
Canal Navigation *vs.* JOHN MIFFLIN.

Same *vs.* WILLIAM ALEXANDER and JOHN ALEXANDER.

Under the act incorporating the Delaware and Schuylkill canal company, the jury shall judge whether a bridge or ford be necessary, but cannot find that neither is necessary.

Roads private or public laid out after 10th of April, 1792, shall not be bridged by the company across the canal.

INQUISITIONS had been returned on writs issued between the parties, pursuant to the 8th section of the law passed 19th April 1792, for incorporating the canal company.

Mr. Lewis now moved to set aside these inquisitions, under the 9th section of the law, and produced six deeds, dated 1753, 1760 and 1761, under which the defendants and others were entitled to a private road of the width of two perches, from the Wissahickon road, to the landing on the Schuylkill, which the track of the canal crossed. He contended that a bridge or ford ought to have been secured to the owners of the ground, who, before the passing of the law, were entitled to a right of passage, under the 9th section: which directs, "that whenever the said canal shall cross any public or private laid out road or highway, or shall divide the grounds of any person into two parts, so as to require a ford or bridge to cross the same, the jury who shall enquire of the damages to be sustained in manner herein directed, shall find and ascertain whether a passage across the same shall be admitted and maintained by a ford or bridge; and on such finding, &c."

Messrs. Tilghman and W. M. Smith, for the canal company, urged, that it rested with the jury to say whether either a ford or bridge was necessary, and if they found no necessity for either, the company were not bound to make one or the other. The words in the act, "public or private laid out road," had a certain definite meaning, and pursued the language of former laws; they extended only to roads laid out by order of Court; they shall be restrained to the same sense, as used in former acts. When the words of a law extend not to an inconvenience rarely happening, and do to those which often happen, it is good rea-

[*Sec 4, S. R. 509.]

son not to strain the words further than they reach, by saying it is *casus omisus*, and that the law intended *quæ frequentius accidunt*. This rule of exposition is laid down in Vaugh. 373. A statute which concerns the public good, shall be construed liberally. 2 Vern. 481.

Should this law be construed as is contended for by the present proprietors of the adjacent grounds, the canal company may be subjected to the extravagant difficulty of arching their canal from river to river, by parties perpetually shifting their grants of passage, and Courts of Justice laying out new roads; which never could have been the intention of the legislature, when they contemplated an object of such public utility.

Mr. Lewis in reply. I cannot subscribe to the construction set up; it is repugnant to every idea I have of justice. Any one who owns lands, may grant a right of passage over them, and the grantee will have an indisputable right to the privilege. 2 Stra. 1004. Roads laid out by the authority of Courts of Justice, only secure to the public this right of passage; and whether a party enjoys this benefit under the records of a Court, or the grant of an individual, having authority to make it, his privilege is equally sacred and inviolable, and will be protected by the laws of the country. Can it be supposed that the legislature meant to delegate powers to a jury, to determine whether a person should be stripped of a legal right, vested in him before the passing of an act, incorporating a public company, and for the emolument of that company? Shall such a jury have it in their power to abridge or prevent any man's clear settled privilege of passage from his lands on the western side of Schuylkill to the city, Frankfort, Germantown, or other place? Surely not. The reasonable construction of the act must be, that the jury shall judge whether a bridge or ford be necessary; but they can go no further; they cannot find that neither is necessary. Undoubtedly the legislature intended to encourage the canal company in the prosecution of an enterprise of considerable public advantage; but the whole scope of the act shows, that the rights of individuals were not to be sacrificed. If any persons were injured by the canal, they were to be recompensed in damages, or some other way. The difficulties feared by the company are merely imaginary. The law relates only to public or private roads laid out at the time of passing the act. Should new public roads be confirmed by the sessions across the canal, the public must bridge them at their own expense; if private ones, they must be bridged by the parties applying.

It cannot remain a question, whether individuals can affect the

interests of the company, by shifting their grants of passage at this period; they certainly can have no such powers.

The Court fully assented to this latter construction of the law, and set aside the inquisitions.

SAMUEL TORBERT and BEULAH, his wife, *vs.* JACOB TWINING and THOMAS STORY.

Parol evidence is not admissible to *supply, contradict or explain* the written words of a will. On a devise of lands in trust, the rents and profits to go to a feme covert during life, unless it can be collected from the words of the will that it was intended for her separate use, her husband is entitled to them.

CASE stated for the opinion of the Court.

David Twining made his will, dated 25th October, 1791, and therein (*inter alia*) devised as follows: "*Item*, I give and devise to my daughter Beulah" (one of the plaintiffs) "the use, issues, and profits of my lands and tenements, not already bequeathed, situate in the township of Newtown in the county of Bucks and state of Pennsylvania, to hold to her during her natural life, and no longer; but if she should have issue to live to the age of 21 years, and there should be *two or more* male heirs, then my will and mind is, that it should be equally divided between them, share and share alike. But if she should have no male heirs, but all females, then it is my will and mind, that the one-fourth part of my lands bequeathed to my daughter Beulah Torbert during her natural life, shall be equally divided amongst them, and the other three-fourths to be equally divided amongst the male heirs of my other three daughters, namely, Sarah Hutchinson, Elizabeth Hopkins and Mary Leedom, share and share alike. I also give and bequeath to my daughter Beulah Torbert, 200 acres of land which I purchased of Richard Leedom in Westmorland county, to hold to her, the said Beulah, her heirs and assigns forever. I also give unto my said daughter, Beulah Torbert, a brown mare five years old," &c.

The testator afterwards, on the 12th November, 1791, made a codicil to his said will, and therein devised as follows: "*Item*, whereas I have given in my last will, all my lands that are not already bequeathed, unto my daughter Beulah Torbert, for and during her natural life, with all the rents, issues and profits, but on further consideration of it, I do give all the lands and tenements and appurtenances, thereunto belonging unto my loving brother, Jacob Twining, and friend, Thomas Story, in trust for the use, benefit, and behoof of my daughter, Beulah Torbert, for and during her natural life, they or the survivor of them to rent out in the best manner they can, so

that no waste is made of the timber, and the best care that can be, to preserve the land from abuse, by extravagant tillage, she, my said daughter, Beulah, to have *all the rents, issues, and profits* arising from the aforesaid plantation, for and during her natural life; and, at her decease, I do give the aforesaid plantation unto the *male heir*, or *male heirs*, of her body, if they should live to the age of 21 years, to be equally divided betwixt them, share and share alike; but if she should have no male heirs, but all females, then it is my will and mind, that the one-fourth part of the land so bequeathed in trust shall be equally divided amongst them, share and share alike, and the other three-fourths I do give to be equally divided amongst the male heirs of my other three daughters, share and share alike," &c.

The above will and codicil were duly proved by the defendants, executors, and trustees, therein named.

The defendants took and sold a crop of wheat which was growing on the plantation devised to them in trust for the said Beulah, at the death of the testator, and received the money for the same, to the amount of 77*l.* 15*s.* 5*d.* They also received the rent of the mansion house, barn, stables, and three small houses, situate on the said plantation since the death of the said David Twining, from November, 1791, until April, 1792, to the amount of 3*l.* 13*s.* 8*d.* There is also 9*l.* 6*s.* 6*d.* due for interest on the first mentioned sum, all which have been duly demanded by the said Samuel Torbert, in right of his said wife from the said defendants, and by them refused to be paid to him before the institution of this suit.

It is agreed that the depositions of Jacob Twining, Elizabeth Twining, and John Story, be made part of this case, but subject to all legal objections.

If the Court should be of opinion for the plaintiffs, then it is agreed that judgment shall be entered for 90*l.* 15*s.* 7*d.* (the amount of the said several sums) damages and six pence costs. If the first mentioned sum should be considered as part of the personal estate of the testator, and going to the executor, then judgment to be entered for the plaintiffs for the residue, amounting to 13*l.* 0*s.* 2*d.* damages, and six pence costs; and if, on the whole, the Court should be of opinion for the defendants, then judgment to be entered for the defendants.

[By the depositions above referred to, it appears that the testator declared, in his last sickness, that his intention in making his codicil was, that the real estate therein devised to his daughter, Beulah, should be for her sole and separate use; and after

he had made his codicil, he declared that he expected he had effected his purpose, and that her husband could not intermeddle with it.]

Mr. Condry, for the plaintiffs, then objected that the depositions annexed to the case could not be read in evidence, being taken *ex parte*, but at length waived his exception on Mr. Wilcocks (counsel for the defendants) declining to go on with the argument, and agreeing, that if the Court should be of opinion that the parol evidence was admissible, his clients should have the benefit of a cross-examination.

He then stated a technical objection to the deposition of Jacob Twining, who was one of the defendants.

As to the two other depositions, he argued that parol evidence was not admissible to explain a devise of lands. The ground was, that frauds should be prevented, and the titles to real property should be open and permanent, not subjected to change by the death or absence of witnesses. Such property would otherwise be insecure, and purchases become games of hazard. A testator may often make use of expressions, either before or after the making of his will, merely to quiet his family, without harboring the most remote idea that such loose words should control his written will. He cited the following cases: Lord Chancellor Talbot refused to receive parol evidence in order to establish a legal right in one executor, under very hard circumstances. He laid down the rule, that the farthest parol evidence has gone was to rebut an equity, or resulting trust, and where such evidence would support the intentions of the testator, consistent with the written will. *Forrest*, 240, *Brown vs. Selwyn*. And the decree in this case was affirmed on appeal to the House of Lords, who would not suffer even the respondent's answer to these matters to be read. 4 Bro. Parl. Cas. 179, 186.

The counsel for the residuary legatee offered to read the testimony of the attorney who drew the will, that he had express directions to give the personal estate in a certain way; Lord Hardwicke said it could not be done, though there were some things here which might make a *judge wish* to admit it. He lays down the rule, that parol evidence on wills is admissible in two cases only: 1st, to ascertain a person. 2d, with respect to resulting trusts, to rebut an equity as to personal estate; as where one makes a will, and appoints an executor with a small legacy, and the next of kin claim the residue. 2 Atky. 373, *Ullick vs. Litchfield*.

Lord Hardwicke declared himself extremely tender, even as

to the admission of parol testimony, to rebut an equity, arising from a resulting trust. 2 Vez. 28. *Blinkhorn vs. Feast*.

Parol evidence is not admissible to show that the testator meant to use general words, in this or that particular sense. 1 Vez. 231. *Goodinge vs. Goodinge*.

Parol evidence not admissible to contradict the words of a will. 2 Stra. 1261. *Lowfield vs. Stoneham*.

The preceding authorities merely respect personal estate, concerning which, it is well known that considerable latitude is used in Courts of Equity. The cases on wills of lands are much stronger.

The construction of wills must be collected from the written words and not by averment out of them; it would be pregnant with inconvenience, if no one could know by the will itself what construction to make or advice to give. 5 Co. 68. b. Lord Cheyney's case.

A devise of lands cannot be explained by parol proof touching the declarations of the testator, or the instructions given by him for the making his will. Wills concerning lands must be in writing, and we cannot go against the act of parliament. 2 Vern. 98. *Towers vs. Moore*.

In a will of lands, no regard is to be had to the parol declarations of a testator. These cases must stand on the written words of the will, and the law was the same even before the statute of frauds and perjuries. 2 Vern. 337, 339. *Lord Falkland vs. Bertie*.

No proof ought to be received to supply the words of a will; nor is any regard to be had to expressions before or after the will; but the will that must pass the land must be in writing, and must be determined only by what is contained in the written will. 2 Vera. 624, 625. *Strode vs. Lady Russel*.

It is possible, that cases on contracts may be cited in support of the opposite doctrine. It is admitted that chancery goes further in such cases, to find out the real intention of the parties, than in others. When a person seeks for the specific execution of an agreement, it is a trite remark, that he who asks for equity must do equity. Yet parol evidence cannot be offered to explain a written agreement complete in itself, though it may be offered to show that something intended to be inserted in an agreement has been omitted by mistake or fraud. *Powel on Cont.* 431, 432. And the true ground on which these decisions rest is, that the proof offered is *no variation* of the agreement, but consistent therewith, and explanatory of it only, and strong circumstances of fraud or mistake pervade all these cases; for such evidence is never suffered to contradict or explain away an

explicit agreement, because that is in effect to vary it, in respect of things *specifically expressed therein*. Ib. 434, 435.

Mr. Wilcocks for the defendants. The parol evidence adduced is not in contradiction of the will, but in support of the true intention of the testator. It is admitted, that all the cases in the books cannot be reconciled. What real distinction can there be between the cases of wills and deeds? or between personal and real estate, when the value of the former may much exceed the latter? 2 Wms. 136. On principles of solid justice, ought not a clear mistake in a will to be rectified equally as in a deed? Whether these depositions shall be read must depend on general principles.

A parol agreement was established by the testimony of Sir John Coel *alone, against the trust* expressed in a deed indented in consideration of marriage, though the lady had a fortune of 30,000*l.* in personal property, and lands of the yearly value of 1,200*l.* and more. 2 Cha. Ca. 180. *Harvey vs. Harvey*.

And this case was approved of by Lord Ch. Baron Reynolds. Fitzgib. 213, 214. Fitzgerald and wife *vs. Fauconberge et al.*

Though there be no express trust in a deed, yet as it might be collected from circumstances arising out of the assignment itself to be inconsistent with an absolute disposition, the lord chancellor admitted parol proof to explain this transaction in avoidance of fraud. 1 Atky. 447. *Hutchins vs. Lee*.

Parol evidence admitted to prove mistake in an agreement. For how, says Lord Hardwicke, can a mistake be proved but by such evidence? It is not read to contradict the face of the agreement, which the Court would not allow, but to prove a mistake therein which cannot otherwise be proved. 1 Vex. 456. *Baker vs. Paine*.

On a devise of *lands* to trustees in trust to pay several annuities, and the residue to go to the testator's right heirs of his mother's side for ever, parol evidence was admitted to prove, that the heirs of the mother's mother's side (and not the heirs of the mother's father's side), were intended. 2 Wms. 135, 136. *Harris vs. Bishop of Lincoln*.

One by will makes A, B, and C executors in trust, and gives them a legacy of 20*l.* apiece for a remembrance, above their charges; two of the executors confessed the trust to be for the wife, though the other denied it. Parol proof was admitted that this was in trust of the wife only. 2 Vern. 99. *Pring vs. Pring*.

One by will subjects his real estate to pay his debts, and makes his wife executrix; parol proof was admitted to prove the testator's declarations, that his executrix should have his per-

sonal estate, exempt from debts. 2 Vern. 252, 253, Gainsborough vs. Gainsborough.

It is objected against Jacob Twining, that he is an incompetent witness, being a defendant; but on looking into the will he will be found to be in no wise interested. But this point need not be pressed, as the other depositions prove the same facts in substance.

By the Court. There is a clear substantial difference between deeds and wills in their very essence, from whence must result a variation in the rule of evidence applicable to each. Deeds are mere evidences of a man's acts and intentions, and where these acts or intentions, either through *mistake* or *fraud*, are not properly committed and comprehended in the written instrument, the law will admit supplementary proofs; but positive law has subjected the deposition of real estate by will, to the restriction of its being in *writing*, and hence it necessarily follows that the words of the written will must control the operation of the devise, and that it must be judged of *ex visceribus suis*.* If expressions of the testator, before or after the making of his will, could increase or abridge the effects of the words used in the writing, what confusion, uncertainty, and inconvenience must issue!—what an inlet would it be to frauds and perjuries! Since the case of *Brown vs. Selwin*† and *e contra* no such parol testimony has been received in the construction of wills, and we cannot now alter or shake the rule of evidence, thus wisely settled, to adapt it to the hardship of any particular case; and therefore we are unanimously constrained to overrule the depositions being read. [Vid. Vez., jr., 415. S. C. 3 Bro. Cha. Cu. 446.]

Mr. Condry proceeded. There is nothing in this will or codicil which evinces the testator's intentions that his daughter Beulah

* The words of the act of assembly of 4th Ahna, § 6 (1 St. Laws, 51), pursue the language of the statute, 29 Car. 2, c. 3, § 22 (of Frauds and Perjuries): "No will in writing shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will, by word of mouth only," &c. [Vid. 4, Bro. Parl. Cas. 185.]

† This case seems to have fully established the rule, that no parol evidence to *supply* or *contradict* the words of a will, or to *explain* the intention of the testator, is admissible when the words used are unambiguous and intelligible. So *Stratton vs. Payne*, 3 Bro. Parl. Cas. 257. *Errington vs. Broughton*, 7 Bro. Parl. Cas. 12. *Chamberlayne vs. Chamberlayne*, 2 Freem. 52. *Cole vs. Robinson*, 1 Salk. 244. *Maybank vs. Brooks*, 1 Bro. Cha. Rep. 85. *Cas. Temp. Talb. 242*. Williams's note (k), *ib.* (See the case of *Lady Fordyce vs. Willis*, 3 Bro. Cha. Rep. 577, where Lord Thurlow refused to receive parol testimony under circumstances of peculiar hardship.)

should take any part of the property devised to her, for her separate use, independent of her husband. Unless such intent clearly appears, the Court will not infer it. It may be said, that unless such were the testator's views, no reason can be assigned for the making of his codicil; for that, under our construction, no alteration is effected of his will. To this it may be answered, that he appears to have created a trust for the benefit of the issue who were to take after the life estate, and guards expressly against the waste of timber and extravagant tillage; but he has not directed the profits to go to the use of Beulah alone, and subject to her control. He might choose to put the superintendence of his farm in persons acquainted with husbandry, well knowing that Doctor Torbert, as a professional man, was unskilled in farming.

Limitation of estates, whether by way of trust, or by estates executed at common law, are to be governed by the same rules. 2 Vern. 342.

Separate maintenances have been viewed with a jealous eye by Courts of Equity; and Lord Hardwicke has said that separate provisions very often occasion the very evils they were intended to prevent. 1 Atky. 276. The husband, by the laws of this country, and of every well regulated government, is the head of the family, and the best judge of their finances. A custom for a feme covert to surrender her copyhold lands without the assent of her husband, is bad; it is said to be contrary to law and the policy of the nation, and tends to make wives independent of their husbands. 2 Wils. 1, 2. A legacy of 100*l.* to a feme covert, who had parted from her husband, which was then well known to the testator, and that the wife was then much straitened for the want of maintenance, and the executor having paid it to the wife, was decreed to pay it again to the husband, with interest. 1 Vern. 261. The legal power of the husband over the estate of the wife is very great. He may dispose of a term assigned to her in trust before marriage (1 Vern. 7, 18), or which she claims for her separate use under a former husband (2 Vern. 270), unless the term be a trust from the husband himself for his wife's benefit. 2 Atky. 208. Vid. 2 Wils. 127.

If the Court should be of opinion with the plaintiffs on this point, there can be little difficulty to whom the corn growing on the lands devised to the defendants for the use of Beulah Torbert, at the time of the testator's death, shall belong. [See Winch. 51. Cro. El. 61. 1 Rol. Ab. 727. Hob. 132.]

Mr. Wilcocks, *e contra*. When the testator, "on further consideration," determined to make his codicil, he must have

intended some material and substantial alteration in his will. The idea suggested that he meant to create trustees, and put the lands under their management, is far from being satisfactory, unless he had more in contemplation. He must have meant to secure a support and livelihood to his daughter, independent of her husband's control, or his codicil could be of but little avail. No certain terms are necessary to vest a separate use of chattels in a feme covert. 3 Atky. 393. Technical words are not necessary to make a separate trust for the wife. The words "livelihood of the wife," are sufficient to show the intention of the giver, that it should be for her sole use. 3 Atky. 399.

The rights of married women are much better attended to of late years than formerly, and the decisions of Courts of Equity have been peculiarly favorable to their interests. He inferred, from a comparison of the will and codicil, that the testator must have intended the profits of these lands for the sole benefit of his daughter Beulah.

M'Kean, C. J. Unquestionably the intention of the testator is the great polar star by which we must regulate our construction of wills. But this construction must be bounded by the words of the will itself. The general rule has uniformly been that unless the intent can be collected from the words, it is in vain to urge it; for otherwise we should be making a man's will, not construing it. Vid. 1 Atky. 273, 274. We may, with Lord Talbot (Forrest. 242), "*privately think*" that the devise to Mrs. Torbert was for her separate use; but "we are not at liberty, by private opinion, to make a construction against the plain words of a will." No technical, or other expressions whatever, such, as "for the livelihood of the wife," &c., are inserted in the will, from which we can collect, or necessarily infer, that this was meant as an independent provision for the daughter. Judging on the face of the will and codicil, I can discover no clear intent disclosed by the testator that the rents and profits of the plantation should not be subject to the control or intermeddling of the husband of Beulah; and unless such intent does appear, the law gives him the whole in right of his wife.

As to the corn growing in the ground, at the time of the testator's death, it cannot belong to the defendants, as executors.

Shippen and Yeates, justices, fully concurred therein.

Smith, J. I own I have serious doubts on the subject. It appears by the cases in 3 Atky., already cited, that no form of

words is necessary to create a separate trust for the feme, and I have met with an authority in 3 Bro. Cha. Rep. 381, that a legacy to a feme covert, "her receipt to be a sufficient discharge to the executors," has been decreed equivalent with saying "to her sole and separate use." Besides, in England, the plaintiff's remedy against the trustees must have been in chancery, and if the husband came into equity to demand these profits, they would put terms on him and oblige him to make a proper provision for his wife. 2 Bro. Cha. Ca. 351; 2 Eq. Ca. Ab. 146; 1 Wms. 459; Bunb. 86; Prec. Cha. 548; 2 Wms. 639; Forrest. 43, 213.

Yeates, J. Even in England, I doubt greatly whether the Lord Chancellor would interpose his authority if the same facts were disclosed to him as came to the knowledge of the chief justice and myself, at the last assizes for Bucks county, *judicially*. It appeared to us that Mrs. Torbert left her husband without cause, refused to return to him on overtures made her, and prosecuted him for adultery, without cause, merely to found certain proceedings against him for a divorce, in the state of Connecticut. [See 6, S. R. 468.]

M^r Kean, C. J. The chancellor clearly would not interpose in such a case.

Judgment for the plaintiffs for 90*l.* 15*s.* 7*d.*, damages, and six pence costs.

TIMOTHY PEACEABLE, lessee of BENJAMIN BIOREN, vs. JACOB KEEP.

Nonsuit set aside because the judge who tried the cause refused a deed in evidence which respected the same lands, and was duly proved.

EJECTMENT for lands in Amity township, in Berks county, tried before Mr. Justice Smith, at the last May assizes, at Reading. It was admitted on the trial that one Mountz Jones was seized of the premises in fee. It appeared by the deposition of Peter Leikens, taken under a commission, that Mountz Jones had conveyed the premises to Andrew Leikens and his wife, for their lives, remainder to the deponent, his heirs and assigns, by deed of gift. The deed was delivered to the said Andrew, and the deponent often saw it, and had it in his possession a considerable time. In 1782, the deponent on examining the papers of the said Andrew, saw the deed for the last time, and read it, and laid it on a bed behind him. Ben-

jamin Boone (who married Susannah, the daughter of the said Andrew, and sister of this deponent, and under whom the defendant claims), was in company with him at this time, and immediately disappeared. The deponent looked for the deed directly, but could not find it, and strongly suspected that Boone had taken it. Mary, the daughter of this deponent, intermarried with Benjamin Bioren, and had a son named Benjamin, the lessor of the plaintiff.

This deposition was overruled by the judge on two grounds. 1st, that he was the vendor, and no release had been executed to him; and 2d, principally, because no notice had been given to the defendant himself, to produce the deed, he claiming under Boone, of whom there was a violent presumption that he had surreptitiously taken away the deed in 1732.

The conveyance from the said Peter Leikens to Benjamin Bioren, his son-in-law, dated 9th July 1771, was then offered in evidence by the plaintiff. The consideration contained therein, was natural love and affection, and 20s. paid. It contained a special covenant of warranty, against the grantor and his heirs, and those claiming under him or them. This was also overruled in evidence, as it did not appear that Peter Leikens the grantor, had any title.

The plaintiff was nonsuited, and the two points reserved. 1st, whether the deposition proving the existence, loss, and contents of the first deed, no notice having been given to the defendant to produce it, ought to have been received in evidence. 2dly, whether the second deed, under the whole circumstances, ought not to have gone to the jury.

Mr. Ingersol, for the plaintiff, at the last term moved to set aside the nonsuit for misdirection for the judge. On the first point he urged, that the general rule was, that if the best evidence which the nature of the case will admit of, cannot possibly be had, then the best evidence that can be had, shall be allowed. 3 Bl. Com. 368. By the deed produced, it appears that Peter Leikens made no general warranty to the father of the lessor of the plaintiff, and a vendor of lands is a witness concerning the title, when there is no covenant of warranty. Glb. Law Evid. 133. 1 Stra. 445. 1 Sid. 51. One is not excluded from giving testimony, unless immediately interested in the event of the suit, or unless the verdict may be given in evidence for or against him, in another suit. 3 Term Rep. 27, 32, 33, 36, 308. The bare possibility of an action being brought against a witness, is no objection to his competency. To repel him, it is necessary to prove that he must derive a *certain* benefit from the

suit's being determined in one way or the other. 1 Term Rep. 164. A creditor having sold his chance of recovering his debt, is a good witness to support a commission of bankrupt. 2 Black. Rep. 1273. 2 Espin. 356, (1st edit.) S. C.

As to the notice to the defendant to produce the deed, it does not appear with certainty that Boone took the deed away, and that fact should have been left to the jury. If he really took it, he would not have delivered it to his vendee, as it might have created doubts concerning the validity of his title, and therefore no notice was necessary. But admit the fact to be otherwise, the law prescribes no certain form of notice, and the interrogatories annexed to the commission amounted to a *virtual* notice to the defendant, or his attorney, to produce the deed at the trial, if he was possessed of it.

On the second point, it is settled, that the Court cannot hinder the reading of a deed under seal. What use is to be made of it, is another thing. 6 Mod. 45. Ford *vs.* Grey. [S. C. 1 Salk. 285, but S. P. does not appear.] This doctrine is fully recognized in this Court, where the deed is duly proved. Dall. 64, 69. It is not meant to carry this point to the extravagant length, that any deeds whatever or any number of deeds, though no ways connected with the matter in question, should be read in evidence; but it is contended, that where the deed respects the lands in dispute, and is duly proved, the Court will not refuse its going to the jury, subject to the Court's animadversions on its legal operation. [See 3 Com. Dig. 279.]

The Chief Justice now delivered the opinion of the Court on the second point, that the deed from Peter Leikens to Benjamin Bioren, duly approved, for the lands in question, ought to have been received in evidence, and read to the jury; the judge should pronounce afterwards upon its legal operation. This point had been now settled so long, that it could not be questioned; and the Court accordingly set aside the nonsuit, without giving any opinion on the first reserved point.

Smith J. expressed his dissent. He found no reason to alter the opinion he had first formed, on due reflection. Courts of justice were equally bound to decide on the propriety of admitting deeds in evidence, as of any oral testimony.

Nonsuit set aside, and a new trial awarded.

GEORGE ROSS and JAMES ROSS executors of GEORGE ROSS, esq.
vs. DAVID RITTENHOUSE, esq.

Cases of prize and their consequences are exclusively of admiralty jurisdiction.

No action will lie against a judge for what he does in that character.

Non-payment of money at the day is a forfeiture of a counter bond.

Qu. Whether an appeal will lie from the general verdict of a jury in the case of a prize, taken by citizens of the United States, and where the contest is between them only, under the act of assembly of September 9th, 1778?

DEBT *sur* obligation, with special conditions.

This cause was tried at *Nisi Prius* for the county of Philadelphia, and a verdict taken for the plaintiffs on the 27th March 1793, for 855*l.* 3*s.* 3*d.* debt, with six pence damages and six pence costs, subject to the Court's opinion on a case stated, which in substance is as follows:

The British sloop *Active*, John Underwood, master, sailed from Jamaica to New York, then in the possession of the British army, about the 1st August, 1778 — Gideon Olmstead, Artemus White, Aquilla Rumsdale, and David Clark, American citizens and sailors, shipped themselves on board of the sloop, and on the high seas rose on the captain and crew on the 6th September following, and confined them between decks.

On the 8th of the same month, the brigantine, *Convention*, a vessel of war, belonging to the state of Pennsylvania, captain, Thomas Houston, and the sloop *Girard*, a private vessel of war, captain, James Josiah, hove in sight, and the sloop *Active* was brought into the port of Philadelphia as a prize. On the 14th September she was libelled there in the state Court of admiralty as a prize before George Ross, esquire (the plaintiff's testator), judge of that Court. The four American seamen claimed the whole vessel and cargo as their exclusive prize. Captain Houston claimed a moiety for the state himself and crew, and Captain Josiah claimed the fourth part for his owners, himself and crew, allowing one other fourth for the four seamen above named. All the claimants were citizens of the United States, and the question between them was, whether Olmstead and his fellow seamen had subdued the rest of the crew of the sloop *Active*, before the other vessels came in sight, and whether hostilities had ceased, before the latter came to their assistance. The libels were tried by a jury duly returned on the 5th November 1778, who found the sloop *Active* and her cargo a prize, and being of opinion that she was not wholly subdued by the four American mariners, gave a *general verdict* that only one-fourth part belonged to Olmstead, White, Rumsdale and Clark, and the other three-fourth parts to the owners and seamen of the *Convention* and *Girard*. This verdict was confirmed by the decree of the judge, and Olmstead and his companions appealed therefrom to the Court of Appeals of the United States. On the 12th December, 1778, their appeal was instituted, and on the 15th of the same month, the sentence of the lower Court was reversed, and the whole proceeds awarded to the appellants, with

280 dollars costs. On the 17th December following, the judge of the State Court of Admiralty decreed that there could be no appeal from the general verdict of a jury, and refused obedience to the decree of reversal. [The libel, answer, depositions, and all the proceedings of the Court of Admiralty of Pennsylvania, as well as the proceedings of the Court of Errors and Appeals, were made a part of the *case*, from which the foregoing facts are extracted.]

The marshal by the order of the judge, brought the money into Court, and one moiety of the net proceeds was paid into the state treasury. On the 1st May, 1779, the defendant as treasurer of the state of Pennsylvania executed the obligation, which is the foundation of the present suit, to the plaintiff's testator, in the penalty of 22,000*l.*—"Conditioned for the re-payment and restitution of the sum of 11,496*l.* 9*s.* 9*d.* paid by the said George Ross, the judge of the State Court of Admiralty to the defendant, as the share and dividend of the said state in and out of the prize sloop *Active*, according to the verdict of the jury on the trial of the same sloop in the Admiralty Court of the said state, *in case* the said George Ross should thereafter in due course of law be compelled to pay the same, according to the decree of the Court of Appeals, in the case of the said sloop *Active*, and for the indemnification of the said George Ross, from all actions and demands, which might arise on account of his having paid the said money to the defendant."

Olmstead, White, Rumsdale, and Clark afterwards brought an action of *assumpsit* for money had and received to their use, against the now plaintiffs as executors of their father, George Ross, in the Court of Common Pleas of Lancaster county, to May term, 1786, and obtained judgment thereon by default. On the 6th November, 1786, a jury of inquiry liquidated their damages at 3248*l.* 4*s.* 7½*d.* on which final judgment was afterwards rendered. [The record of this recovery was also made a part of the case.] But it was stated, that the *defendant had no notice of these proceedings until after the final judgment obtained.*

The present suit was brought on the obligation, for an indemnification against this judgment.

The arguments of counsel took place in April term last. Mr. Lewis, for the plaintiff, stated the case and observed that three questions would naturally arise thereon.

1st, Had the Court of Appeals of the United States jurisdiction over the cause?

2d, Had the Court of Common Pleas of Lancaster county jurisdiction?

3d, Are the plaintiffs damnified; or, will the circumstances of the case warrant the present suit?

As to the first point: The resolves of congress, of November 25th, 1775 (1 vol. Cong. Journ. 260), were founded on the just principle of retaliation, Great Britain having encouraged the American seamen to take the vessels of their owners into British ports. Under the 4th resolution, they "recommended to the several legislatures in the united colonies, as soon as possible, to erect Courts of justice, or give jurisdiction to the Courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient." And in the 6th resolution it is expressly declared that, "in *all* cases, an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of congress within forty days afterwards," &c.

A law of Pennsylvania was enacted September 9th, 1778, by which a Court of Admiralty was established; and by section 6, it is directed that the trial of all libels shall be by jury, and that "the finding of the said jury shall establish the facts, without re-examination or appeal." In section 7, it is provided that, in *all* cases of captures, an appeal shall be allowed to congress, or such persons as they shall appoint, for hearing and trying appeals. But it is singular, that they restrict the demand of appeals to within *three* days after definitive sentence, and the appeal to be lodged with the secretary of congress, within *thirty* days afterwards. It is also worthy of observation that this act was passed on the day succeeding the time when, *even* Captains Houston and Josiah must admit, that the crew of the sloop Active was fully subdued, and all hostilities had ceased.

This law was at length repealed by another act passed on March 8th, 1780 (in conformity with the resolve of congress, of January 15th, 1780. 6 Cong. Journ. 11), whereby it is enacted that the judge shall pass sentence and decree, "according as the maritime law and law of nations, shall require; the trial to be by witnesses, according to the course of the civil law;" and an appeal in *all* cases of prize on water, to lie to the judges of appeals appointed by congress.

Under the resolves of congress, of November 25th, 1775, there can be little doubt that the true meaning thereof was to reserve

an appeal in *all prize cases*, as well in matters of fact as of law. It cannot be construed otherwise, without doing plain violence to the words. The authority of the state legislatures was founded on the resolve of congress, and they could have no power in derogation thereof.

The congress derived their right from a higher source than those legislative bodies; and whenever the latter made provisions inconsistent with the resolutions of the former, they could have no legal effect. The war of Great Britain was not directed against thirteen *individual, separate* colonies or states, but against the whole body of the people, considered as one common mass, "who had revolted," as it was said. The rights of *war and peace* were delegated, by the common consent of the people at large, to the congress, and that body was alone competent to decide in the *dernier resort* in cases of prize. This inherent right they must necessarily have been possessed of, for the *common safety and defense*, lest war with foreign states might be introduced by judicial decisions, unknown to the laws of nations. Distinct states could not, in the nature of things, possess powers adequate to these great objects, and could have no right to interfere, unless through the recommendation of the congress. This body exercised the supreme power, as representing the interests of the Union; and hence, they only could authorize the fitting out of privateers, and make proper and general regulations as *incidental* thereto. But if the different states possessed those powers, individually, General Washington would have had no right, during the war, to march his army through Pennsylvania, without the authority of that state. This absurdity will scarcely be contended for by the state advocates, but it must necessarily flow from their positions.

The second point is established by the decision of this Court in *Henderson vs. Clarkson*, April term, 1792. The plaintiff there purchased from seamen a number of shares of prize money. The defendant was marshal of the Court of Admiralty, and received the seamen's money, and the suit against him was declared to be maintainable. There, the money was *in transitu*, and not in the hands of an agent. The present case is much stronger, for Mr. Ross, as judge of the Court of Admiralty, had no more right to receive the money which arose from the sale of the sloop *Active*, and her cargo, than to receive the public papers from the office of his *register*; and in the former particular, he could not be legally said to have paid the money over, as the judge of the Court. A captor of a prize assigns his share thereon before condemnation, it was held, that the assignee might maintain a suit against the ship's agent. The property was

vested as soon as the ship was taken. 1 Wils. 211. And if the suit had been brought against any other person than the agent, it would equally have been maintainable.

The common law courts have jurisdiction in matters of prize, where there is a vested interest under an act of parliament. Where there is an adjudication of prize by the Admiralty Court, the rights which the statute gives, are cognizable in the Courts of common law. H. Bla. 515. The officers of the land service have recovered at law, against the agent in the case of prizes taken at sea. Ib. 520. Agents are supposed to be subject to actions, at the instance of those who are entitled to share in the prize. It is a legal vested right, and the method of obtaining the effect of that right is by action against the agents. Ib. 522, 523.

The only objection I have heard against this case of *Home vs. Earl Camden*, is the denial of the jurisdiction of the Court of Admiralty; on which ground alone, I apprehend the judgment of the Common Pleas was afterwards reversed in B. R. Vid. 4 Term Rep. 382, 393, 397.

As to the third point, I take the current of authorities to be clearly with the plaintiffs. On a counter bond, conditioned to save the obligee harmless from another bond, the money not being paid at the day, the counter bond is forfeited. 1 Vent. 261. And in such a case it is no plea to say, that as the defendant was going to pay it, he was prevented by the covin of the plaintiff. Cro. El. 672. Nor that the first bond was usurious. Ib. 642, 588. Where one is obliged to acquit another of such a debt, or such a suit, it is not sufficient to save him harmless, but he ought to procure his actual discharge. Cro. Jac. 340. The plea of *non fuit damnificatus* implies, that the defendant had saved the plaintiff harmless, by release, payment, or otherwise. 5 Co. 24, a. It is no plea to a counter bond, that the first bond was usurious. 2 Leon. 166. 2 Anders. 121. Non-payment of the money at the day is a present forfeiture of a counter bond. Putting the obligee in danger of being arrested is a damnification.

Messrs. Ingersol and Moses Levy for the defendants. On the first point. The articles of confederation of the United States were agreed on in congress, on the 15th November, 1777 (3 Cong. Journ. 502), and were sent to the different states on the 15th November following, but were not finally ratified by Maryland until 1st March, 1781. Whether the congress had, previous thereto the extensive powers contended for by the plaintiffs, will best appear by considering that before the final

accession of Maryland, they were but an assembly of agents from the different states, not elected in any one state or colony, except Connecticut, by the people. They first met on September 4th, 1774, and afterwards on May 10th, 1775, under limited powers, the extent whereof was defined by their instructions. Their avowed purpose was the redress of grievances, not the formation of new governments in the first instance. All the charges of treason afterwards were against the different states, not against the congress. So in the states of Holland all the rights of war and peace are still vested in the different states. Until the declaration of independence all the American colonies professed a dependence on Great Britain, and it would be absurd to speak of any supreme sovereign power being delegated to the congress in 1775. The resolves of that assembly were generally recommendatory, as on the 25th November, 1775. It is admitted, in the much approved public letters under the signature of "Federalist" (pa. 68 in the bound volume), that the powers of the congress were extremely lax, until the formation of the new constitution. And it will not be pretended by the warmest congress advocates, that if that body had concluded a peace in 1775, or 1778, with Great Britain, the peace would have been binding on the then united colonies or states, until the ratification thereof, by the individual colonies or states.

The governor of Connecticut actually granted commissions to their officers in 1775.

But admitting for a moment, that the congress had the exclusive rights of peace and war, and all the necessary incidental powers, before the confederation, how have they exercised them to affect the present question? They recommend the trial of captures by jury; they adopt a system with all its consequences, of which it must be supposed they were fully aware. It was then well known, that civil and common law Courts differed in their mode of procedure, both of proof and relief. An appeal will lie in the civil law Courts, but not in the Courts of common law, on a general verdict, except for error apparent on the face of the record. 3 Bl. Com. 378, 379, 380, 406. Juries have a right to determine both on law and fact; and the congress fully acquainted with this truth, recommend it to the colonies, to erect Courts of admiralty for the trial of prize causes, by jury, under such qualifications as to them should seem expedient. If mistakes have taken place, they can only be attributed to the congress, the state, or the state judge, but individuals ought not to suffer thereby.

To form a true judgment of this resolution of the congress, we must carry ourselves back to the years 1775 and 1778. Con-

temporanea expositio est fortissima in lege. We may now think more calmly and dispassionately, when the pressures of danger are past, and where there is no impending necessity to reconcile the public mind to public measures; but we can never think so correctly of the intentions and designs of the congress, unless the existing circumstances of those years pass in review before us. In the address of the congress to the people of Great Britain (1 Cong. Journ. 39), they claim the *right of trial by jury*. They pass an enlogium on jury trials (Ib. pa. 41), and lament the want of it in prosecutions, where the supposed offender and the witnesses might be known to *juries de vicineto*, who could ascertain the degree of credibility to be given to their testimony. They deprecate the inconveniences of an admiralty jurisdiction, the judge a single man, and creature of the crown, &c. So in their address to the inhabitants of the colonies (Ib. pa. 49), in their petition to the king (Ib. 68), in their address to the inhabitants of Great Britain (Ib. pa. 152), and in their address to the people of Ireland (Ib. pa. 181), the same sentiments are held forth.

Under these impressions, then, the resolutions of congress had passed; their feelings were aroused at the decisions of civil law Courts stripped of a jury, and we must conclude that they intended the trial of prize causes should be in the usual course of common law proceedings. It would be unworthy of the respectable character they bore to suppose that they meant to deceive the people by a mere *ignis fatuus*.

Where a statute prescribes a penalty, it must be recovered by bill, when no other mode of recovery is directed. 2 Salk. 606, pl. 4. So if to be punished according to one's demerit, it must be by indictment. So when it gives a penalty, to be recovered before justices of the peace, but prescribes no method of recovering it, it must be in the ordinary course of justice by indictment. Ib. So wherever a power is given by statute to inquire, hear, and determine, it must be according to the course of the common law, by a jury. 4 Bac. Abr. 644.

The words of new statutes are to be construed according to former decisions on the same words. 1 Bl. Com. 60. *Ad questionem facti, non respondent iudices; ad questionem juris, non respondent juratores.* 1 Wils. 55; Co. Lit. 155, b. A saving, totally repugnant to the body of an act, is void. 1 Bl. Com. 89. *Mala est expositio, quæ corrumpit textum.*

The appeals under this resolution may be taken to be in the nature of mere writs of error. Thus the Pennsylvania laws (pa. 74), considers appeals as writs of error, and, 3 Bl. Com. 402, considers writs of error as appeals from the Courts.

This Court cannot but recollect the late trial of Gideon Henfield, in the Circuit Court of the United States, at Philadelphia, for a misdemeanor in infringing the rights of neutrality, and that he was acquitted by a jury of the country, against the decided opinion of the judges, and that a bill of indictment was returned *ignoramus* against him by the grand jury, in Massachusetts; so of three other cases in Georgia. And yet possessing, as congress now do, under the late constitution, the sovereign powers of war and peace, can they bring the same matters in review before other juries? Or can it be deemed derogatory to their dignity that they can exercise no such power?

If, therefore, the congress possessed this inherent power of appeal in prize cases, they surrendered it to juries. The act of 1778 goes no further, as to denying re-examination or appeal on a general verdict than the common law would have done, without the same words; *expressio eorum, quæ tacite insunt, nihil operatur*.

There is also a wide difference between recommendatory and "imperative" words. The former are used in the resolve of congress, and the meaning of such terms is plainly defined in the letter of Mr. Jefferson, the late secretary of state, to Mr. Hammond the British minister (correspond. of Brit. and Amer. ministers, 31). The *enacting* and *recommending* a thing to be done, are distinct matters. It comes in effect to this, that the congress have recommended to the different legislatures to erect Courts of Admiralty in a certain way; and the state of Pennsylvania has not thought proper to accede, in all particulars, to the proposed system.

The strong ground on which these great inherent powers were supposed to rest, in the congress of 1775, is, that by their superintendence and ultimate determination on appeals, they might by an uniform system of legal decision, prevent wars with foreign states. But this reasoning will not apply to cases where all the parties litigating are citizens of the United States, as in the case before the Court. The defendant, therefore, should he concede the power of the congress of determining appeals in prize causes generally, may safely deny them in the present instance.

Claims respecting prizes may arise from three different parties. 1. The captor enemy; 2. The captured enemy; and 3. A neutral. 3 Term Rep. 331. Here the demand is by citizens of Connecticut, suing in the plaintiffs' names.

The admiralty tribunal as to prizes, is introduced as to foreigners only; as to subjects, the municipal law must govern. In questions of prize between subjects, the statutes must decide,

but not in the case of foreigners; for, where they are to be affected, the customs of the British admiralty and domestic statutes must be admitted with more caution and reserve. 1 Woodeson, 138, 139. The law merchant, so far as it is positive, may be altered by any municipal legislature, where its own subjects only are concerned; but no change can be wrought in the natural law of nations, as to foreigners, by any confederated union of human authority. Woodes. Elem. Jurisprud. 4to ed. 92. So, in the question of *postliminii*; by the marine law of England, there is no change of property in case of a capture before condemnation, but now, by statute 29, Geo. 2, c. 34, s. 24, the *jus postliminii* continues forever. Park on Insur. 180. Whether *lawful prize or not* is a question between subjects of different states, and belongs entirely to the law of nations, and not to the municipal law of either country to determine it. 3 Bl. Com. 69.

The statute of 13 Geo. 2, has made great alterations in the law of nations as to recaptures; by it the recapture revests the property of the owner. 3 Atky. 195, 196.

The statute of 21 Geo. 3, c. 15, called "The Dutch Prize Act," regulates how booty taken in war shall be divided among the captors. Hen. Blackst. 476.

The state of Pennsylvania might, therefore, with propriety, have denied an appeal to congress in prize cases between subjects of the United States; and the state of Massachusetts has likewise uniformly denied them that power, until the ratification of the confederation by Maryland on the 1st March, 1781.

On the second point: The Court of Common Pleas of Lancaster county could not carry into execution the decree of a Prize Court. What tribunal can decide between the United States and the commonwealth of Pennsylvania, two separate sovereignties? Questions of prize, and their consequences, are solely and exclusively of admiralty jurisdiction. Doug. 572, 587. 3 Term Rep. 344. 4 Term Rep. 382, 400. Dall. 220, 221. The great question in the admiralty of Pennsylvania, and in the Court of Appeals, was, *to whom* the sloop Active was a prize—whether to Olmstead and his fellow-adventurers alone, or to them and the crews of the Convention and Girard? This is a consequence of prize which a Court of common law has no jurisdiction of. The case of Henderson *vs.* Clarkson, so much relied on by the plaintiffs, was a suit by the purchaser of several shares of prize money from seamen against the marshal of the admiralty, and was founded on a settled account, part whereof was disputed.

On the third point: The decision in Lancaster county was a mere nullity. If a Court has no jurisdiction, its proceedings have no validity. 10 Co. 76, b. It is admitted by the state of

the case, that the defendant had no notice of the action at Lancaster till after the final judgment. He consequently cannot be bound by the proceedings there. On an indemnification bond the defendant may plead *non damnificatus*; or, in excuse, if he has been damnified, that he himself was the occasion of it. 2 Wils. 126, 127. If the condition be to save harmless from such a thing, this does not extend to actions in which he might have a lawful defense without the obligor; 5 Vin. Ab. 172, pl. 6, Bro. Conditions, pl. 64; cites S. C.; for the other is not bound to save him harmless against all the world.

The words of the condition of this bond are to repay the money, in case the plaintiff's testator shall be compelled to pay the same in due course of law. The general words of indemnity are not to be extended further.

If the plaintiffs have sustained a loss, it has been occasioned by their own laches in not making their defense, or giving notice to the defendant to make one in their stead; they shall not, therefore, recover over.

It is, moreover, contended, that the condition of this obligation is against law, and therefore void. Co. Lit. 206, b.

Assumpsit will not lie for the value of corn out of sacks delivered by the plaintiff, a bailiff, under an attachment. He ought not to have delivered it to the party who sued out the attachment; and so the promise is against law, and void. Oro. El. 230. Contracts are void where one undertakes to do an act prohibited, on two grounds: 1st, because it may be presumed the party did not give his full assent; and, 2d, the law takes from the contractor the power of obliging himself to do it. 1 Powel on Contr. 164. Where the consideration or the promise is unlawful, the whole contract is void; so, if one, who is a minister of justice, promises to do a thing that is unlawful in his office, or another promises to save him harmless in so doing, such promises are void; so, a promise *generally*, restraining one from using his trade, is void, though there be a consideration. 1b. 176, 177.

Should it be admitted that the act of assembly of Pennsylvania was void, by reason of its not pursuing the resolution of the congress, the order of the judge in his decree must also be void, and consequently the appeal, and the obligation, with its unlawful condition now put in suit, must be mere nullities.

Mr. Lewis, in reply: While I assume, on the one hand, the proposition, that under the authorities cited, the proceedings at Lancaster shall amount to the proof of a damnification, I shall admit, on the other, that they are not conclusive on the defend-

ant, but that he is now entitled to as full a defense in every particular, as he might have had in the action of *assumpsit*.

It has not been urged by the plaintiffs, that the act of assembly of 1778, is merely void, as being repugnant to the resolution of congress; but that municipal state provisions incompatible therewith, can have no effect. This is a dispute between the commonwealth of Pennsylvania and certain citizens of Connecticut. The defendant cannot shelter himself as an *individual* under a supposed error of the former. He represented the state when he received the money, as their officer of treasury, and is indemnified against his obligation by their vote. It cannot escape observation, that though the *jus postliminii* and laws of *salvage* are proper objects of the English statutes, yet all the subjects are supposed to be virtually represented in their parliament. Olmstead and his little party were aliens to our laws, and had no voice in the choice of our representatives; they did not come voluntarily into the port of Philadelphia to be subjected to the laws of Pennsylvania, but were tortiously compelled thither by the superior force of two armed vessels, who seized their prize: and it is now pressed against them, that an *ex post facto* law of Pennsylvania, materially different from the resolves of the Union, shall operate against them, under all these circumstances of hardship.

The condition of the obligation is not unlawful. There was no oppression under color of office in taking the bond. The state admiralty judge freely admitted the appeal when demanded; and the defendant received a proportion of the net proceeds of the prize, as treasurer of the state, and executed the obligation under a vote of the house of assembly, the circumstances of the whole case being known universally.

In all the cases cited by the defendant's counsel on the second point, the question of "prize or no prize" might have arose. Here all the parties to the controversy by their libel, affirm the sloop Active to be a prize, and an evident distinction in this particular presents itself. In *Henderson vs. Clarkson*, the jurisdiction of this Court was warmly litigated. I am free to confess, that in that cause, I was of opinion, a Court of Common Law had no jurisdiction, the money being merely *in transitu*; but my objection was overruled on full argument.

It is agreed that the powers of congress were not defined previous to the confederation; yet it must also be admitted, that in the nature of things, they possessed every power necessary to the common welfare. They met, it is true, in the first instance, for the redress of grievances; but British measures soon dictated a different style of conduct. When the calamities

of a war were inevitable, and actually took place, they executed by the *common consent* of the great mass of the *people*, the powers incident to a supreme head, in conducting systems of defense and reprisal, and warding off public danger. From whence else, besides this great source of authority, founded on immediate necessity, did congress appoint a commander-in-chief, and other subordinate officers of their army, commission privateers, and send blank commissions to the different colonies and states? (See Lee on Captures, 238, 241.)

It has been relied on that the articles of confederation first gave the power of erecting Prize Courts, and it is thence inferred that the congress had it not before. To this I answer; 1st, the powers not given by that system of union were reserved to the different states, and therefore it was necessary to enumerate them specially. 2dly, Several powers were thus given, which they necessarily and uniformly exercised before. Though there could be no treason against the United States until the adoption of the late constitution, it does not follow that we were at all times before in a state of dependence on Great Britain.

Under the express words of the 6th resolution of the congress of 25th November, 1775, an appeal in *all cases* of capture on the high sea is reserved to them. They never could have meant that juries unacquainted with the laws of nations should *conclusively* decide on both law and fact. The peace and safety of the country could not be thus preserved. They must have intended that an appeal should lie to them in all cases, on a general as well as special verdict, on a demurrer and the decree of the judge. The maxim, *ad questionem facti non respondent iudices*, was never supposed to apply to a civil law Court, for there the judges do determine facts on the written proofs.

Proceedings in the nature of *appeals*, from Courts of Law, are by writs of *attaint* against the jury, *audita querela*, or principally by writs of error. 3 Bl. Com. 402, 404, 405. There are these differences between appeals from a Court of Equity, and writs of error from a Court of Law. 1st, that the former may be brought on any interlocutory judgment, the latter upon nothing but only a definitive judgment. 2d, that on writs of error, the House of Lords pronounce the judgment, on appeals it gives direction to the Courts below to rectify its own decree. Ib. 55. Appeals lay from the Courts of Admiralty, both in England and America. Ib. 69. The expressions of the act of assembly of 1778, that "the finding of the jury shall establish the facts, without re-examination or appeal," must be confined to a special verdict alone. In our case no facts are thus established but the jury have drawn erroneous inferences from the facts disclosed

in evidence, which form a part of the record, and could as well be judged of by the Court of Appeals as by the jury.

It has been said, that Massachusetts has regularly denied to the congress the power of appeals in prize causes, anterior to the confederation. New Hampshire, and, perhaps, Rhode Island, may be inciuded in this observation ; but if the opinions of distinct states are to have weight in this argument, we may safely pronounce, that nine states at the least were in favor of this right of the congress against four others. Several instances have occurred, wherein appeals from the verdicts of juries have been lodged in the Court of Appeals of the United States, and there finally decided. It forms a highly respectable authority for the decision of the question of right in the congress in this cause, that the different judges of the Court of Appeals have uniformly regarded the point as fixed and settled, and a great majority of the congress have given their sanction thereto.

After this long argument, the Court took time to advise thereon ; and the disturbances in the western counties of the state having prevented the meeting of all the judges at the last September term, the Court now proceeded to give their opinions *seriatim*.

M'Kean, C. J., having fully stated the case, observed, that thereon several questions had been made, which may be stated as follows :

1. Had the Court of Appeals jurisdiction to investigate facts after a trial and general verdict by a jury, and to give a contrary decision, without the intervention of another jury ?

2. Had the Court of Common Pleas of Lancaster county jurisdiction in the action by Olmstead and the others against the executors of the judge ? Or, should not the decree of the Court of Appeals have been carried into execution by that Court, or the state Court of Admiralty, without the aid or interference of any common law Court ?

3. Can an action be maintained on this bond, the condition whereof is virtually to disobey the Court of Appeals and the laws of the land, if that Court had a right to decide contrary to the general verdict of a jury ? And whether the plaintiffs, without having defended or given notice to the present defendant of the suit in the Court of Common Pleas, can support an action on this bond ?

I conceive it proper for me to premise, that I took notice at the time a similar action was first brought to trial in this Court, that when the business was before the Court of Appeals of the

572; 3 Term Rep. 344; 4 Term. Rep. 382, 400; Dallas, 221; 1 Wils. 211.

I also think that no action will lie against a judge for what he does as such. Cro. El. 80, 397; 1 Mod. 184, 185; 2 Mod. 218; 12 Mod. 388, 391; 1 Ld. Raym. 465; 2 Ld. Raym. 767; Salk. 397.

Shippen, J. Two principal questions arise on the case.

1. Whether the Court of Appeals of congress were competent to decide the question of "prize or no prize," and the consequent question of *who* were the captors to *whom* the prize should be adjudged, contrary to the verdict of the jury in the state Court of Admiralty.

2. Was the action of Olmstead, and others, against the executors of the judge of the admiralty, for the money lodged in his Court, in consequence of his own decree, cognizable in the Court of Common Pleas of Lancaster county?

As to the first question, I own I am not convinced that the sovereign power of the nation, vested by the joint and common consent of the people and states of the union, with the exclusive rights of war and peace, and with the consequent necessary powers of judging, in the last resort, of the legality of captures on the ocean, can either in reason or sound law, be precluded from deciding on appeal, both of facts and law, arising in cases of prize, merely because they had *recommended* to the different legislatures to pass laws to establish Courts of Admiralty for the trial of prize causes, in which the facts were, in the first instance, to be tried by jury, according to the course of the common law.

1st. Because in the nature of things, and according to the course and practise of all Civil Law Courts, all decisions in the Courts, in the last resort, *upon appeals*, are made upon a view and full consideration of both fact and law.

2ndly. Because otherwise appeals from the inferior Courts would in most cases be vain and nugatory.

3rdly. Because otherwise no steady and uniform rules of decision could be established, and foreign nations could never know or confide in the grounds of our decisions; and it does not appear to me *material* that in the present instance all the parties were *American* citizens.

And lastly, because in the present case, congress has explicitly reserved the power of the final decision upon appeal in *all cases*.

As to the second question, whether an action is sustainable in the Court of Common Pleas, in behalf of Olmstead, and others,

against the executors of the judge of the admiralty, for the money he distributed according to his own decree, I acknowledge that I cannot discover any principle or authority in law upon which such an action can be supported.

It is not now to be made a question, whether the Courts of Admiralty have not an exclusive jurisdiction over all questions of prize or no prize, and also who are the captors of prizes, and how distribution shall be made, together with the power of enforcing their own decrees. The cases of *Lindo vs. Rodney* (Doug. 591), *Le Caux vs. Eden* (Ib. 572), and *Camden vs. Home* (4 Term Rep. 382), fully settle this point.

The jurisdiction of the admiralty seems likewise to be *exclusive* in many cases where the question of prize appears to be *at rest*, as where the admiralty has decided that a ship taken is *no prize*, as in the case of a neutral vessel. In that case, it is not competent for a Common Law Court to sustain a suit for the illegal capture, but a new libel is exhibited in the admiralty to compel the captors to account to the captured. 4 Term Rep. 385. So in the case of *Le Caux vs. Eden*, an action for false imprisonment would not lie at common law, where the imprisonment was merely in consequence of taking a ship *as prize*, although the *ship had been acquitted*. I know of but one case where the Common Law Courts have sustained suits for money, paid out of the Court of Admiralty in consequence of a taking as prize, and that is, where the admiralty has fully liquidated all demands relating to the proceeds of a prize, and the money remains in the hands of the agents of the captors; in such cases, actions at law have been supported against the agents. But in those cases it must be ascertained that these are the agents of the real captors, for if any thing is left for the admiralty to settle, as if other persons, not represented by the agents, claim any part of the proceeds, there the Courts of Law will not interfere. And this was the case of *Lord Camden vs. Home*. 4 Term Rep. 382.

What is the case before us? A judge of an inferior Court of Admiralty condemns a prize, declares who are the captors, and orders a distribution accordingly. On appeal to the Superior Court of Admiralty, that Court reverses his judgment, and directs a different distribution. The judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeably to his own decree. A suit is brought here to compel the judge to perform the decree of the Superior Court. Was the case or question of prize at rest? — or was there not something more to be done by the Superior Court to enforce this sentence? Can ours be a proper Court to decide between the sentences of

seamen might recover at common law their prize money, due under the decree of the Court of Admiralty of Pennsylvania.

I find from my notes, that the circumstances attending that action were as follow. The plaintiff was appointed agent for forty-three seamen on board the privateer brig Holker, to receive their prize money. The defendant was marshal of the Court of Admiralty of Pennsylvania, where two of the prizes were libelled, condemned, and sold. The plaintiff, on the 27th December, 1781, gave a bond to the commonwealth in 2,500*l*. penalty, conditioned to account faithfully with the seamen, and to pay over the shares unclaimed within one year, to the use of the corporation of contributors to the Pennsylvania hospital. The judge of the admiralty on that day also issued a warrant to the defendant, to deliver over the goods and money due to the owners and seamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. That suit was brought to recover the prize money due to the plaintiff's constituents. The marshal had paid a considerable part and *rendered his account*, but some of the items therein were disputed. The Court, on full argument, resolved that the agent might, as a common head or centre for the captors and hospital, under the right acquired by the acts of assembly of 8th March and 22d September, 1780, institute a suit in his own name, as the captors themselves might have done; and as the question respecting *prize or no prize* could not come into controversy, he might recover the money due to them by the admiralty decree, they having a *vested interest* therein, under the acts of congress and the legislature. The marshal had returned to the judge, that he had the goods and money ready to be delivered to the captors or their agent, and this was held to amount to a written promise to pay the same to the plaintiff, Henderson, as agent of the seamen.

The two cases are not analogous; they possess distinct prominent features. In the former cause there was no question *who* were the captors, or how the booty was to be *divided*; there were no discordant decrees of different marine Courts, no dispute respecting the constitutional powers of the judicature which pronounced the final decree; here they all fully exist, and a Common Law Court at Lancaster was called on to carry into execution the decree of the Court of Appeals against the executors of the state judge, and in derogation of the decree he had given, sanctioned by the verdict of a jury.

On the first point it is not absolutely necessary to give an opinion, whether, if the resolve of congress had been *absolute* and *imperative*, instead of being barely *recommendatory*, as to the

establishment of Courts of Admiralty in the different states, and the law of any one state had been repugnant thereto, such resolution would be supreme, and control the law of the individual state; or to attempt to define the former powers of the congress, by fixing how far they reached anterior to the accession of Maryland to the confederation, on the 1st March, 1781. I am, however, compelled to say, that the powers of the congress must necessarily be supposed to have been co-extensive with the great objects which America then had in view, and competent to protect and advance the united interests of the whole. It is sufficient, in my idea, for the decision of the case before us, to observe that the present suit resting on the judgment in Lancaster county as its basis, if the then plaintiffs were not legally entitled to recover against the executors of Mr. Ross, the action now before the Court is not sustainable. 3 Term Rep. 377.

I have only to add, that it would have also afforded me much pleasure if this argument had been conducted before the judges of the Supreme Court of the United States. We formerly indulged ourselves with hopes of it, when the jury were discharged in an action between the now plaintiffs and Thomas Leaning, in January term last, where the same points came in question. We may be considered in some remote degree, as parties to the present suit, and the decision of the federal judges would probably have given more general satisfaction. But our opinion has been insisted on, and we are bound to give it. On the best consideration, therefore, that I have been able to give the subject, I find myself constrained to give my voice, that judgment be entered for the defendant.

Smith, J. I had the honor of being one of the committee of the house of assembly, who met a committee of congress in conference on the business of the sloop 'Active. Being fully sensible of the difficulty of eradicating early prejudices, I intended to have declined giving any opinion on the points argued before the Court; but I will, however, now say, that I perfectly agree with the judge who last delivered his sentiments. Were it necessary to give my sentiments on the first point, I should incline to the opinion of the chief justice respecting it. On one point, I have no difficulty in saying that no action would lie against a judge, for what he does in that character. In addition to the cases already cited on that head, see 12 Co. 24, 25. 7 Mod. 81. Carth. 494, 497. Hardr. 71. Holt. 395. 14 Vin. 579.

Judgment for the defendant, by all the Court.

BENJAMIN FULLER vs. ARCHIBALD M'CALL.

Where the voyage is lost, though the property insured be not damaged to one-half of its value, the insured may abandon and claim as for a total loss; but if he receives intelligence of a loss from one who is not his factor or consignee, and acts in pursuance of it, but does not quickly and unequivocally make an abandonment, he shall not afterwards on subsequent events turn a partial into a total loss.

CASE. On a policy of insurance, subscribed by the defendant (amongst others), on the sloop *Mary*, William Southern, master, from the port of Philadelphia to Trinidad, with a clause therein, that the assured might labor and travail in case of a loss, without prejudice to the insurance.

The plaintiff shipped flour on board the sloop, amounting as per invoice to 935*l.* 8*s.* 4*d.* The sloop sailed from Philadelphia on the 5th May, 1789, met with a violent gale of wind on her passage, which greatly injured her sails and rigging, and made her ship much water, and on the 10th June following she made for the first port, and arrived at the island of St. Bartholomew on the 20th June, in distress, on which day captain Southern made his regular protest. On the 22d June a survey was had on the sloop, and it was found she could not keep the sea, and on the 24th it was found on a survey of the cargo, that it had received damage in certain specified proportions, the plaintiff's adventure having been greatly damaged by water.

The captain on his arrival at St. Bartholomew, applied to Nicholas Dawes, esq., a merchant of reputation there, who by letter of 3d July, 1789, informed the plaintiff of what had happened, that his flour was so damaged it could not be re-shipped, and that there was but little prospect of selling it at first, but that from some fortunate circumstances the cargo was at length disposed of for 3067 dollars.

It appeared on the trial that one Samuel Keith, a lad about 16 years old, was in the plaintiff's counting house, when this letter was received in Philadelphia, on the 23d July. His master was then at Cape May, but previous to his going there, had given him directions, in cases of moment, to apply to Mr. Joseph Fisher, merchant, for his advice and assistance. By his order, the underwriters in the city were called upon and shown this letter. Accordingly a number of them met on the next day, and a new policy was opened, and subscribed by them on the return cargo, for the benefit of the plaintiff and those concerned. Fisher and three of the insurers were of opinion, that the cargo belonged to the former underwriters, but no advice or directions were given by the latter what steps should be pursued. On the 28th July, the plaintiff returned to Philadelphia, from Cape May, and approved of what had been done. Captain Southern returned also from St. Bartholomew, to Philadelphia, on the 29th July, in the sloop *Mary*, having procured a mainsail from St. Eustatius. He brought dispatches from Mr. Dawes, but no money, pretend-

ing that he had been robbed off the coast of 2470 dollars, the net proceeds of the cargo, which Dawes had delivered to him. The inconsistency of his story and suspicion of his conduct induced the plaintiff and the underwriters to agree, that a suit should be brought against him in the name of the plaintiff, but *without prejudice to the claims of either*. A recovery was afterwards had thereon, and Southern escaped out of jail on the *ca. sa.* for which a suit had been commenced against the sheriffs and was still depending.

On the 6th November, 1789, the plaintiff formally abandoned the cargo by letter, but his proposition was rejected by the underwriters. He received two other letters from Mr. Dawes, dated July 7th and 20th, 1789, which were read on the trial. It was proved that St. Bartholomew lying to the leeward of Trinidad, the voyage from the former to the latter island might be made in a fast sailing vessel in seven or eight days.

On the foregoing facts, it was agreed that a verdict should be found for the plaintiff for 123*l.* 1*s.* 6*d.* as for a total loss, subject to the Court's opinion, whether on the facts thus proved, it could be considered as a total or partial loss? And if the former, whether an abandonment had been made in due time?

The cause was tried in January term last, by Messrs. Lewis and Tilghman, for the plaintiff, and by Messrs. Ingersol and Levy, for the defendant; and was argued afterwards by them, the same term.

For the plaintiff, it was contended, that the matter before the Court must be considered in the nature of a motion for a new trial, and not as a case stated, or a special verdict. The Court here will weigh all the testimony, and draw inferences therefrom.

It is obvious, that the sloop was not fit to go to sea again, without considerable repairs. She had shipped much water in the course of her passage outwards; the cargo was greatly damaged, particularly the plaintiff's flour; and in a warm climate, in the midst of summer, it could not have proceeded to a warmer climate without extreme risk. Wherever a vessel does not arrive at her destined port, or the voyage is lost, the insurers must answer as for a total loss. The insured may abandon, if the damage exceed half the value of the thing. *Le Guidon*, c. 7, art. 1. So if the voyage be absolutely lost, or not worth pursuing; if the salvage be one half; if further expense be necessary, and the insurer will not engage at all events to bear that expense; and in many other cases. *Parke on Insur.* 164. Cites 2 Burr. 1209. If neither the thing insured, nor the voyage, be

lost, and the damage do not amount to one-half of the value, the owner shall not be allowed to abandon. Parke, 165. Cites 1 Term Rep. 191. The captain has not an arbitrary power by his act to make the loss either partial or total, as he pleases. If the voyage be lost, or not worth pursuing, insured may abandon. Parke, 174, 175, 176. Cites Dougl. 219. So if the underwriter refuse to bear the expenses, where the salvage is high, and the other expenses great. Parke, 180, 181. Cites 2 Burr. 1198. 1 Bl. Rep. 276. The true way of considering a policy, is as an insurance on the ship for the voyage. Parke, 187. Cites 1 Term Rep. 187. In this instance, it was a contract, that the goods should arrive at Trinidad.

As to the time of making an abandonment, positive regulations in different counties have fixed a precise period, before the insured shall be at liberty to abandon, in the case of a mere arrest or embargo, by a prince, not an enemy. Parke, 170. Cites 2 Burr. 683. But the time of making an abandonment is not fixed by the laws of England; yet it must be done in a reasonable time, according to the circumstances of the case. Parke, 92, 192, 193. 1 Term Rep. 616. 2 Term Rep. 407. It is not meant that the same strictness shall be applied to abandonments as in the cases of bills of exchange or promissory notes indorsed and dishonored. 1 Term Rep. 614. The plaintiff's young clerk Keith, was not bound to abandon, nor would it be reasonable to expect it from the plaintiff, on the very day of his return from Cape May; and the day following, Southern returned without the money. But there was an actual abandonment by Keith, who actually showed the underwriters then in town, the letter from Mr. Dawes the day it came to hand, and the next day they met and took measures for their common safety. At all events, all the underwriters to the first policy, except one, subscribed the second policy. An abandonment may be in any form, notifying the intention of the parties. Weisk. 6, 7, 376. The insurers did all they could to procure payment from Southern. Nothing more could have been done, if they had received the most formal notice of abandonment. If the insured does no act to abandon, it must be considered as a partial loss. 1 Term Rep. 615. Here there was an act done by the plaintiff's clerk.

Besides, on a dispute taking place between insurers, and the plaintiff on the 20th July, they agreed that a suit should be brought in the name of the latter, for their common benefit; and where one party pursues a middle course pointed out by the other party, the latter must abide by the event of his own interference. 2 Term Rep. 414.

If the plaintiff then did not formally abandon, it was owing to

the conduct of the underwriters ; and therefore the time of abandonment must be considered as prolonged by mutual consent. Such conduct will supersede the necessity of notice. See Parke, 173.

But independent of the foregoing observations, it is apprehended to be a material circumstance in this case that the sloop did not go into the hands of the plaintiff's *agent or consignee*, but to Mr. Dawes, who must be considered a mere *stranger* as to him. A letter from Dawes, therefore, did not carry such information as the plaintiff was bound to receive or to credit. It was the mere tale of a third person, on which the plaintiff was neither obliged to give notice of an abandonment to the underwriters, or to take any decided step whatever. The not concealing this letter, and the frank communication of it to the insurers, will surely not be objected by them as an argument that the plaintiff shall not recover as for a total loss.

For the defendant, it was urged on the first point, that there was no natural or moral impossibility as to the sloop going to Trinidad. She had got a mainsail from St. Eustatius, and had returned to Philadelphia. Why not then go to Trinidad, which was but seven or eight days sail from St. Bartholomew? It is admitted by the plaintiff that the captain could not change a partial into a total loss ; it was, therefore, a *deviation* in him to come to Philadelphia, instead of pursuing his destined voyage to Trinidad, which would excuse the underwriters. Besides, the goods were not damaged to the amount of half of their value, which the books lay down as necessary in such cases to entitle the party to abandon. The owners can only abandon when there is a total loss. Parke, 188 ; 2 Burr. 1213.

On the second point. Losses on insurance are of three kinds : 1st, a small or slight one. 2d, where the object insured is totally lost, as by the vessel foundering. 3d, where the voyage is defeated, or where the property is damaged at least one-half in point of value. The abandonment is at the election of the party insured ; he must do the first act. Before the insured can demand as for a total loss, he must abandon to the underwriters. Parke, 161. Though in all cases the insured has a right to say he will abandon, yet he cannot by saying he will abandon, turn a partial into a total loss. Ib. 162. The notice of abandonment must be given the *first opportunity* (1 Term Rep. 613), and the intention must be shown by some plain act. Ib. 615.

The settled mode of estimating an average loss on an insurance is, that the underwriters shall pay such proportion or ali-

617), "When the account of a loss has reached the assured, they must take their election whether they will abandon or not; if they do, they must give notice of their intention to the underwriters within a reasonable time; if they act otherwise, they cannot be permitted, at any subsequent period, to change the partial into a total loss."

The chief justice delivered the opinion of the Court in January term last, to the following effect:—

The circumstances which were disclosed in evidence on the trial, that the sloop was much injured by the gale of wind, and consequently needed many repairs at St. Bartholomew, an island different from the destined port, and in a warm latitude, and the considerable damage which the plaintiff's flour sustained in the passage, induce us unanimously to think that the voyage was lost, and, consequently, the plaintiff might have abandoned and claimed as for a total loss.

On the second point, the law cases are clear, that the insured must abandon immediately on receiving notice of a loss, or within a reasonable time, if he would demand as for a total loss. His election cannot be suspended until future events arise. It must be *quick* and *unequivocal*, and his abandonment must be *pure, simple, and unconditional*. Wesk. 7, cites 2 Valin's Com. 143. The insurers are hereby enabled to take measures for their own security, which they cannot otherwise effect. The plaintiff's clerk received intelligence of the loss on the 23d July, and both he and Mr. Joseph Fisher must be considered as his agents, and he moreover approved of what they had done. But no election is made in pursuance of this intelligence until above three months afterwards. To entitle the plaintiff to a compensation for a total loss, there should have been an absolute abandonment between the 23d and 29th July, of which we have no evidence. On the 6th November he gives formal notice of his abandonment to the underwriters, which would imply that no previous notice of his election had been given. Though the agreement of the plaintiff and the underwriters, on the 30th July, to sue Captain Southern in the name of the plaintiff, may account for the subsequent delay, yet no satisfactory reason has been given why the election of abandonment was not made and signified to the insurers before that time. The event was then certain, that Southern had returned to Philadelphia without the net proceeds of the cargo sold at St. Bartholomew, and the plaintiff could not afterwards make his election.

No cases have been shown to us evincing that information of a loss must of necessity come from a factor or consignee, before

the insured is put to his election; but if such were the mercantile law, the plaintiff *having acted* in pursuance of the intelligence received for his own security, he has adopted the acts of Mr. Dawes, and made him his agent.

We are therefore of opinion that the plaintiff is not entitled to recover of the defendant, as for a total loss, under all the circumstances of this case.

The plaintiff's counsel hereupon prayed that they might be permitted to argue the case again, and that no judgment should be entered at this term for the plaintiff; to which the Court gave their assent.

The case was afterwards argued the second time by the same counsel, at the last September term, when the reporter was not present, but no new law authorities were cited on either side, as he is informed; but the plaintiff's counsel laid considerable stress on the circumstance, that Mr. Dawes could not be considered as the *agent* or *consignee* of the plaintiff, and therefore he was not bound thereon to give any notice of abandonment to the underwriters; to which the defendant's counsel repeated in substance the answers which they had before given.

The Court held the matter under advisement, until this term; and now, the chief justice having stated the circumstances of the case, declared the unanimous opinion of the Court, that the plaintiff was entitled to recover only an average loss from the defendant, and that they saw no sufficient reason to change the sentiments which they had expressed at the last January term.

ALEXANDER CARLISLE *vs.* SAMUEL BAKER.

Return to a *certiorari* on a recovery before the mayor in debt on a by-law, need not set out the evidence; it is no conviction.

It is a fatal exception to such a recovery, that a summons has issued on two different charges, and a judgment had on one, without taking notice of the other.

A city ordinance inflicting a penalty on persons placing goods on their porches or cellar doors, projecting more than six inches into the street, is bad.

CERTIORARI to the mayor of the city of Philadelphia.

The mayor returned that the defendant was summoned before him to answer the plaintiff in a plea of debt under 40s. "for placing goods on the footway of the street, *and on his porch*," contrary to an ordinance of the mayor, aldermen, and citizens of Philadelphia entitled "A supplement to an ordinance, entitled an ordinance for the suppression of nuisances, and enforcing

as well as the beauty of the city. The act of 1789 does not confirm the right of the citizens in every possible use of their porches and cellar doors, extending into the street four feet three inches. It only restricts them from making or setting them up beyond that distance, under a penalty. The preamble to the 45th section shows, that the obstruction of the streets was one of the objects intended to be guarded against; and it could not be the intention of the legislature, while they declare in the 46th section, that porches and cellar doors exceeding the above dimensions, and that bulks, jut-windows, and other incumbrances shall pay a yearly sum, until they are reduced or taken away, that the inhabitants should have the most absolute and unlimited use of their porches and cellar doors for all purposes whatsoever, or be entitled to encumber them with goods and packages for any length of time. Their intention must have been, to confine porches and cellar doors to their common, natural, and reasonable uses.

This appears still more strongly from the 47th section of the act, prohibiting signs, sign-posts, boards, poles, or other devices or things whatsoever, denoting their place of residence, their occupation, or business, or the merchandise or things which any persons have to dispose of, from being set up in the streets, lanes, or alleys, except in the case of inns; and the street commissioners are expressly authorized to remove all manner of obstructions to the passage through the streets. And the subsequent proviso declares, that this shall not prevent persons from setting up any such sign, or other device or thing whatsoever, against the walls of their several dwellings, so that the same shall not project or extend into the said streets, lanes, or alleys more than six inches.

It is therefore submitted to the Court, that this ordinance, so far from being repugnant to the laws of the state, or abridging or altering the rights of the inhabitants to the proper use of their porches or cellar doors, is in strict conformity to the letter and spirit of the act which prohibits persons from having any device or thing whatsoever denoting their business or merchandise for sale, which shall extend into the streets more than six inches. And consequently this regulation is good in law, and beneficial to the citizens.

The Court gave no opinion herein at the last term, and Mr. Wilcocks, at his request, was now again heard this term in behalf of the city ordinance, when he enforced his former observations; and afterwards the chief justice delivered the opinion of the Court.

We are unanimously of opinion, that this by-law is bad in

itself. Under the act of 1769, the citizens are entitled to have porches, cellar doors, and steps extending four feet and three inches into the streets, which may be fifty feet in width. City ordinances, under the express terms of the charter of incorporation, shall not be repugnant to the laws of the state. But this ordinance prohibits, under a penalty, the citizens from the due use of their porches, secured to them by an act of the legislature. "They shall not place their goods, &c., on any porch, or on or over a cellar door, or suspend them from a pent house, if they project more than six inches towards the street."

The citizens, therefore, claimed the due enjoyment of their porches, by law; and they might as well be restricted from sitting in them, or making any other use of them, as from placing goods thereon.

The 47th section of the act of 1769, must clearly be restrained to *signs*, or other *devices of the like nature*, denoting the occupations or business of the party, and the words, fairly construed, will bear no other sense.

Persons should not be prevented from making a *reasonable* use of their property. It is not, however, our idea that porches may be built in any form whatever, or that they may be erected so as to reach up to the second story of the houses, or to any other extravagant height or size; for this would be highly unreasonable in itself. But we hold that such porches as had usually been made and occupied before the act of 1769, are secured to the owners, with their full enjoyment, and that a by-law, restrictive of this legal right, is not good.

As to the other exception, the record should be good in all its parts. It is uncertain whether the evidence warranted the judgment "for placing the goods on the footway of the street," as well as on the porch; if it did, the judgment was for too small a sum; if it did not, we cannot discover on which clause of the ordinance the mayor gave judgment, and there is so entire an uncertainty therein, that we could not, independent of the unconstitutionality of the by-law, award a confirmation thereof.

The proceedings, therefore, on both grounds, must be quashed.

APRIL TERM, 1795.

PRESENT—M'KEAN, CHIEF JUSTICE, SHIPPEN, YEATES, AND SMITH, JUSTICES.

RESPUBLICA vs. GUARDIANS OF THE POOR, in the city of Philadelphia.

Mandamus will not lie to the guardians of the poor in the city of Philadelphia, to continue three of the old managers to superintend the alms house and house of employment, for the succeeding six months.

MOTION by Messrs. Ingersol and Bradford, for a rule to show cause why a *mandamus* should not issue to the guardians of the poor, in the city of Philadelphia, to proceed to an election of three managers of the alms house and house of employment, their election and appointment on the 25th March last having been defective and illegal.

They contended that the guardians of the poor not having appointed three of the old managers to superintend the alms house and house of employment, was pregnant with inconveniences, as it introduced persons into offices with the duties whereof they were wholly unacquainted, and that the offices of managers and overseers of the poor were distinct in their nature. Though the law of the 25th March, 1782, was not very explicit on this head *in terminis*, yet the intention of the legislature was sufficiently evident from the 6th section thereof (2 Dall. St. Laws, 19), "that there should always be some experienced persons in office;" and this Court was competent to mould the act into form and judge of its true meaning. They insisted that the uniform practise, since the year 1788 (when the eventual new corporation of the guardians of the poor took place, under the provisions of that act), had been to leave three of the old managers in office for the succeeding six months, and thereby their duties were readily and easily discharged, and that this usage had great weight. The cognizance of seamen's wages in the admiralty, 1 Salk. 33, the Courts of Quarter Sessions originating matters of apprenticeship, 1 Stra. 704, and maintenance of the poor, *per saltum*, Comb. 321, and cases of warrants of distress for poor rates, Comb. 342, 1 Lord Raym. 42, have all been determined merely on the footing of usage. The interests of the community were involved in the present measure, and it was hoped that the Court would interpose therein.

Mr. Rawle, *e contra* for the guardians, denied that either the act of 1782 or that of 27th March, 1789 (2 Dall. St. Laws, 685),

restrained them to the appointment of any of the old members ; but the legislature had left it in their discretion to appoint any six of their own number. He denied the extent of the usage asserted on the other side.

Per Curiam. The practise was certainly a good one, to leave in three of the old managers on a new appointment, and tended to train up new members to a ready discharge of their offices. But the legislature have not thought proper to put the guardians under this restriction ; the appointment is left to their discretion, and one-half of the overseers are succeeded by others every six months. We should go too far in saying that the late election has been defective and illegal. The legislature only can give a full and complete remedy, and through them application for redress must be sought, if inconveniences arise from appointments similar to the present.

Motion overruled.

CHARLES PULASKI *vs.* EZEKIEL KING.

A mortgage payable by instalments, all of which become due within seven years next after an inquisition taken, must be taken into consideration by the jurors.

MOTION to set aside an inquisition.

The defendant had executed a mortgage to the plaintiff for 3666 dollars and 67 cents, payable by instalments, the last whereof would not become due until the month of July next. Bonds had accompanied it, on one of which judgment had been entered, and a *f. fa.* issued for 2000 dollars, and interest from 1st July, 1794. The jury, in estimating the rents and profits, took the judgment, only, into consideration. They refused to consider the mortgage, all the periods of payment not being past, and therefore did not condemn the house and lot seized and taken in execution by the sheriff.

The Court set aside the inquisition. They declared that all the instalments becoming due within the seven years next after the jurors holding the inquisition, ought to have been regarded by the jury when they formed their judgment. The term "Re-prizes," in the act of assembly of 4th Annæ (Prov. Laws, 50) clearly include mortgages.

Mr. Hallowell, *pro quer.* Mr. Wells, *pro def.*

WILLIAM HOSACK vs. HENRY WEAVER.

No markets overt in Pennsylvania for the sale of goods

REPLEVIN for a grey stallion. Plea, property in defendant.

The plaintiff showed his property in evidence by three witnesses, and that in the month of December, 1792, the stallion was either lost or stolen out of his wagon in an inn yard in Winchester, in Maryland. Afterwards, in January, 1794, the plaintiff discovered him in the defendant's possession in Philadelphia, claimed him, but the defendant refused to deliver him up.

The defendant founded his claim on a purchase or exchange, made between him and one Patrick Keating, in the horse market in this city, *bona fide*, and for a full consideration, on the 19th December, 1792; and proved that he had been publicly shown there, two or three market days before the sale.

And his counsel contended, that no evidence having been given to evince an actual larceny of the stallion, the plaintiff was divested of his property by the transaction in the horse market.

They argued, that at common law, a sale in market overt by a party who had no property, shall bind the right of the true owner. Kely. 35. And a sale of stolen goods in a place where such articles are usually and publicly sold, will divest the true right. Moor. 360. The true owner of goods does not lose his property unless by a sale in a market overt. 3 Atky, 49, 51. Trover will not lie after a change of property by a transfer in market overt. 2 Espin. 337, 338.

A distinction has been created by positive British acts of parliament between the sales of horses and other personal property. Before the statutes of 2 Ph. and Mar. c. 7, and 31 Eliz. c. 12, the sales of stolen horses in market overt were conclusive on the former proprietors. But those laws afterwards pointed out particular directions which were to be pursued, and if not fully complied with, such vendees acquired no property. 2 Bl. Com. 449, 450, 457.

Under the 7th section of the act of assembly passed 23d September, 1780 (made perpetual by an act of 9th December, 1783), "No sale of any stolen horse, by virtue of this act, shall be deemed a public sale in market overt, so as to change the property thereof." 1 State Laws, 409. And from hence they inferred that previous to the passing of that act there were markets overt in Pennsylvania, and that the sale of a horse not stolen, in market overt, changed the property.

For the plaintiff, it was insisted that the universal opinion re-

ceived at the bar, was, that there were no markets overt in Pennsylvania. The expressions quoted from the law of September, 1780, may be fairly supposed to have arisen *ex abundanti cautela* of the legislature, that no false notions should be entertained of a sale at public auction passing the property of a stolen horse, and repel all ideas of such auctions being deemed markets overt.

The policy of markets overt, as a commercial regulation, may well be doubted. A variety of judicial decisions have however established the point, that no such markets ever existed amongst us. Among others, in *Thomas vs. Hess*, in replevin, determined by Mr. President Shippen, in the Common Pleas of Philadelphia county, it was clearly resolved, that where a feather bed had been sent from Chester county to a friend in the city, who had betrayed his trust, by selling it at public vendue, and an innocent purchaser had fairly bought it, and paid his money, the original owner should recover. It is not pretended in mercantile life amongst us that a sale in any store in the city will change the property, unless the vendor had a title, and there is much less reason in, and greater public inconveniences result from the position, that a sale in a horse market shall divest a right to a horse stolen by villainy, or lost by casualty.

The Court gave in charge to the jury that the credibility of the witnesses, who asserted the plaintiff's property, lay solely with them. If they had no good reason to disbelieve them, the verdict should be for the plaintiff, with such damages as they believed that he had really sustained. In England, sales in fairs or markets overt, were held to be binding on all those who had property in the articles sold, except in the cases of stolen horses, which were subjected to the regulations of the statutes of 2 Phil. and Mar. and 31 Eliz. 2 Bl. Com. 449. This efficacy of markets overt arose from prescription, and was part of the ancient common law. But in this government, we have no such ancient law or custom. On the contrary, the uniform determinations of Courts of Justice have rejected such an usage, whenever it has been relied on, and great inconveniences would arise from adopting it. We think these resolutions founded in honesty, and the soundest and best policy. In the language of Sir John Kelyng, "They tend to the advancement of justice, to make men prosecute felons, and they will discourage persons from buying stolen goods, though in a market overt; for under that pretense, men buy goods there for a small value, of persons whom they have reason to suspect, which practise these resolutions will abate." Kely. 48.

The jury were of the same opinion, and found a verdict for the plaintiff with 60*l.* damages and 6*d.* costs.

Mr. Tilghman, *pro quer.*

Messrs. Moylan and S. Levy, *pro def.*

MARY JONES *vs.* SAMUEL RINGOLD.

Interest is due on a parol award for the sum awarded.

INDEBITATUS *assumpsit.* Pleas, *non assumpsit* and payment.

It appeared that the plaintiff had boarded and lodged the defendant and his family for some time; and a dispute arising about some of the items of the account, is was submitted to arbitrators by parol, who struck off 11*l.* from the plaintiff's claim, and awarded 55*l.* 1*s.* 4*d.* to be paid by the defendant.

The Court informed the jury, that they should give a verdict for that sum, and interest from the time of the award. It was equivalent to a (Vid. 3 Wils. 206. 2 Vez. 365) settled account between the parties.

Verdict for the plaintiff for 58*l.* 7*s.* 4*d.* damages.

Mr. Hallowel, *pro quer.* Mr. S. Levy, *pro def.*

RESPUBLICA *vs.* SAMUEL RICHARDS.

The 7th section of the act of 29th March, 1788, extends not to the case of a sojourner forcibly carrying off his slave.

Where a corporation are parties, or immediately interested in the question, a member of it cannot be a juror or witness.

If the comonwealth proves acts of violence or fraudulent seduction of a negro in this state, other acts of violence or frauds in another state may be proved to show the intention of the defendant.

INDIOTMENT, misdemeanor. It contained two counts under the act of assembly of 29th March, 1788. 2 Dall. St. Laws, 589. 1*st.*, that the defendant, by fraud, seduced negro Toby into New Jersey, with a design and intention of selling him as a slave. 2*d.*, that he caused him to be seduced into New Jersey with such design, &c.

Before the jury was sworn, it was admitted that the prosecution was carried on by the society for the abolition of slavery, incorporated 8th December, 1789, by law. Thereupon the defendant's counsel insisted that none of the members of that society should be received as jurors.

By the Court. If a body politic or corporate bring an action that concerns their body, and if a juror be of kindred to any that is of that body, it is a principal challenge. Co. Lit. 157. a.

Where a corporation are parties, or immediately interested in the question, no freeman can be either a juror or witness. 3 Keb. 12, 295. 3 Burr. 1855. The objection to the members of this society is relevant.

One Isaac Cox, a witness on the part of the commonwealth, was proceeding in his testimony with respect to a violence committed by the defendant on the negro in New Jersey, but was stopped by the counsel, who contended that the crime must be proved where laid. 2 Haw. 236. This Court has no jurisdiction of an offense committed in Jersey; the laws of that state alone are competent to redress injuries done there.

The Court observed that the witness might give evidence of the defendant's acknowledgments in a sister state, and after the prosecutors had, by way of ground-work, proved acts of violence or fraudulent seduction in this state, they might go on to show other acts of violence or fraud in New Jersey, to evince the *quo animo* of the defendant, which was done accordingly.

The facts on the evidence turned out to be these: The negro was the slave of General John Sevier, of the Southwestern Territory, and was purchased and retained by him as such for eight or nine years. He was put under the custody of Major Sevier, his son, to attend him on a visit to Philadelphia, in the month of January, 1794. In April following, shortly before the Major's return home, Toby absconded, but being discovered, was sent over into New Jersey. Major Sevier, and the defendant, his brother-in-law, also crossed the Delaware. The negro attempted to escape from them, but was pursued, and being overtaken, was struck several times by both, and was sent against his will to Gloucester, and from thence to his master's place of abode, by the defendant. The defendant acknowledged that he had sent the negro over into Jersey, to compel him to return home.

Messrs. Lewis and Hallowell, for *repub.* contended that the defendant was obnoxious to the penalties of the 7th section of the act of 29th March, 1788. The legislature intended to remedy the evils arising from the practise of drawing negroes or mulattoes out of the state by force or fraud, and then selling them as slaves in other places. They preferred preventive to vindictive justice, and designed to put those unhappy people of color in a better situation in this instance than whites, because the system of kidnapping the latter had not obtained amongst us. When a negro or mulatto slave or servant misbehaved, recourse should be had to the constituted authorities. The trouble to which masters would be subjected in this mode would be

The plaintiff's witness swore, that the coffee was delivered to the defendant in June, 1793, between 10 and 11 o'clock, at night, and that the persons bringing it were told to make no noise, by the defendant, in consequence of which they scarcely spoke above their breath. The defendant came on board the vessel to buy the coffee, and agreed on the price, but nothing was said whether the coffee was entered in the custom house or not. No objection was made against the delivery of the coffee at so late an hour. The witness had also sold two bags of coffee to the defendant under the same circumstances; and he was afterwards told by him, that if he appeared against him, he (the defendant) would be ruined.

It was sworn on the part of the defendant, that when the plaintiff came to speak to him on the night of the delivery of the coffee, he objected to his servant receiving it in the night time, and said it must be brought to the shop at noon-day. The coffee was, however, discovered next morning in the shop, standing open to public view, and was there seized by the revenue officers.

The defendant's counsel urged, that if the consideration of the contract failed, the compensation must fail also. If a contract respected a matter prohibited by law, it was void, on the principle of sound policy. So, if a policy of insurance be underwrote on a vessel going to a port blockaded by enemies, it would be void by the law of nations. The plaintiff's counsel admit, that if this suit had been brought in the Circuit Court of the United States, there could be no recovery; or, if there had been a law of Pennsylvania prohibiting the running of coffee, the same event would take place. But by the 6th article of the constitution of the United States, the laws which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every state shall be bound thereby. The Court, therefore, where the suit is determined, can make no difference in the case.

Possibly, however, where a vendee of prohibited goods is fully acquainted with all the circumstances, and with this knowledge takes the risk on himself, he may be bound by his contract. The testimony of the plaintiff's witness is very suspicious. His prospect of recovery for his two bags of coffee rests on the plaintiff's success. He is interested in the question trying. Instances have frequently occurred, where one brought forward as a witness has denied his interest on oath, and has afterwards publicly asserted it. The price of the coffee cannot be considered as low. No drawback is allowed on goods, unless the duties thereon amount to fifty dollars, and therefore a small quantity will not command a price proportionate to a

larger. The difference is still greater where the smaller quantity is sold for ready cash. If the defendant had known the coffee to be run, he would not have exposed it to public view. It is in full proof that the plaintiff did not tell the defendant the coffee was smuggled; and it is therefore submitted to the jury whether, under all the circumstances, the defendant knew it to be such, and took the risk on himself.

The counsel for the plaintiff contended that it was sound policy to punish the purchasers of prohibited goods. It would be an effectual check to illicit trade, if no purchasers could be found for the smuggled articles. This case must be governed by the laws of Pennsylvania, and not of the United States. The suit is not in the Circuit Court of the latter, where probably the plaintiff could not recover. The vendee should have entered the coffee after the sale. The original contract is not affected by the subsequent use of the thing contracted for; as if one lend money to another to game with, though gaming be illegal, the lender shall recover the money, though it be lent at the time and place of play. 2 Burr. 1077.

They inferred the defendant's knowledge of the coffee being run, from his not asking for a certificate; his first refusals of the coffee at night, yet afterwards receiving it without the knowledge of his servants; the smallness of the price, and his desiring the plaintiff's witness not to appear against him. His exposing the coffee openly was merely to elude suspicion. The plaintiff, or his witness, would never have deposited the coffee with the defendant, unless there had been a previous perfect understanding between them.

By the Court. If the concession had not been made by the defendant, that if he had known all the circumstances, and agreed to run the risk, the plaintiff might possibly recover, we should have had no difficulty in forming our opinion. The revenue laws of the United States are binding on the Courts of each individual state. It is against the policy of any well regulated country to suffer frauds to be practised which may prevent the collection of moneys for the support of government. A party cannot come into a Court of justice to recover on a contract for smuggled goods. It must not appear on the plaintiff's own showing that he has infringed the laws of his country. 3 Term Rep. 456. A contract for prohibited goods to be delivered in England is void. The buyer shall not be liable in an action for the price, because of the inconvenience and prejudice to the state, if such an action could be maintained. Cowp. 344, 345.

But it has been mutually submitted to the jury, whether the defendant knew the coffee was smuggled, and of this fact they will judge. The Court are inclined to think that the weight of evidence as well as the law, is in favor of the defendant.

Verdict *pro quer.*, for 37*l.* 10*s.* damages.

But a rule to show cause why a new trial should not be had, was afterwards obtained, sitting the Court.

Messrs. J. B. M'Kean and S. Levy, *pro quer.*

Mr. Lewis, *pro def.*

WILLIAM GREYER *vs.* WILLIAM DECKER.

If orders are given to a factor they must be pursued, or he becomes liable; if none are given, or they are not clear, the factor may use his best discretion, according to the usage of trade.

ASSUMPSIT. The plaintiff shipped from Philadelphia to the defendant, in Charleston, three casks of gin and four casks of apple whisky, on the 5th April, 1793, and addressed a letter to him of that date, directing him "to receive and sell it on its arrival, and remit the produce by the same vessel, or any other vessel, to Philadelphia, in bank notes."

The defendant wrote him an answer on the 26th April, following, informing him that money was scarce in Charleston, and the liquor remained on hand. He afterwards, on the 20th July, following, wrote him a second letter, enclosing him the account of sales, the neat proceeds being 63*l.* 16*s.* 3*d.*, South Carolina currency. The defendant remitted him 27*l.* 8*s.* 10*d.* thereof, and the remainder consisted of outstanding debts, the articles being sold on credit, he having taken a mortgage for 24*l.* 15*s.* part thereof.

It was proved that the general course of trade in Charleston was to sell goods on credit; and the question which occurred was, whether the defendant had deviated from his instructions, and of course became liable for the balance of the neat proceeds?

Mr. Hallowell, for the plaintiff, insisted that the plaintiff's orders were clear and express to sell for cash; the produce of the adventure was to be remitted, if possible, to the plaintiff by the same vessel. The defendant's answer of the 26th April, amounted to an acknowledgment that his orders were to sell for cash, when he complains of the scarcity of money. If a commission be *to sell and dispose*, the factor is not enabled to sell upon tick; nor can a factor sell even *bona peritura* upon credit, without a particular commission so to do. 3 Bac. Ab. 587, 588. The latter part of

the case is not contended to be the law of this day ; but a factor ought to sell for ready money, unless the usage of trade is otherwise. 1 Espin. 109. And let the usage be what it will, he is bound to follow the instructions of his principal. It is notorious, that in England, more credit is given in commercial cases than in America.

Mr. Ingersol, for the defendant, contended that the plaintiff's letter did not amount to a prohibition to sell on credit; it contained no special instructions to sell for cash. The usage of trade in Charleston will therefore warrant him in what he has done, according to the authority cited in *Espinasse*. We are in a peculiar situation in the United States. Credit here is more necessary than in the European world; and it has accordingly been settled, in *Bingham and Lewis vs. Bache and Shee*, and *Randolph vs. Hollingsworth*, and in several other cases in the Common Pleas of Philadelphia county, that a factor may sell goods on credit, unless he be otherwise specially restricted. But it is, moreover, a settled rule, that where a merchant receives an account of sales, and he does not object to it by the next conveyance, he shall be supposed to acquiesce therein. Why did not the plaintiff express his dissatisfaction at an early day, before bringing his suit?

By the Court. The law in the present case is conformable to plain common sense. If the principal gives orders to his factor they must be pursued, or he becomes liable. If none are given, or if they are not clear and explicit, the factor is allowed to use his best discretion, according to the usage of trade. Want of precision in the plaintiff's letter has given birth to this controversy. His orders contain no directions to sell for cash only. The defendant early informed him of the scarcity of money, but he is wholly silent thereon, and after the receipt of his letter of the 20th July. This is a strong proof of an acquiescence, and he shall not now be permitted to govern himself by subsequent events.

Verdict for the defendant.

SAMUEL BEEALSFORD, ROBERT WILLIAM POWELL, and JOHN HOP-
TON, *vs.* GEORGE MEADE, garnishee of THOMAS WOOLRIDGE
and ABRAHAM LOTT, surviving partners of WILLIAM KELLY.

A plea in abatement by garnishee on a *scire facias* on a foreign attachment, that one of the parties was not named, is not good.

Answers of the defendant to interrogatories filed against garnishee cannot be received in the argument of a demurrer.

THIS was a *scire facias* on a foreign attachment against the garnishee. The original attachment was issued in the Court of Common Pleas of Philadelphia county, returnable to December term, 1783. The *scire facias* was returnable in the same Court to September term, 1790, and removed into this Court by a *certiorari* in March term, 1791.

To this *scire facias*, issued in the common form, the following plea in abatement was put in on the 5th September, 1791.

And the said George Meade, by Edward Tilghman, his attorney, cometh and prayeth judgment of the writ of *scire facias* aforesaid, and of the several proceedings therein mentioned; because he saith that he, the said G. M., on the 21st October, 1783, and a long time before, as well as since, was a co-partner in trade with a certain Thomas Fitzsimons, using and exercising commerce and trade by the name and firm of G. M. and company, and that the said G. M. and T. F., on the same 21st October, in the year aforesaid, were indebted to Woolridge, Kelly, and company, and to the survivors or survivor of them (but whether the said company consisted of Thomas Woolridge, Abraham Lott, and William Kelly, then, or at any time, the said G. M. knoweth not, though he hath understood, and believes, that the said W. K. and A. L. were of the said company), in the sum of 819*l.* 17*s.* 2*d.* sterling money of Great Britain. And the said G. further saith, that he, the said G., was not, at the time of service of the said writ of attachment on him, the said G., and the summoning him as garnishee, or at any time afterwards, separately and distinctly from the said partnership of G. M. and company indebted to the said W. K. and company, or any of them, in any sum or sums of money whatever, nor had he, the said G. M., separately and distinctly from the said partnership of G. M. and company at the time of the service of the said writ of attachment on him, the said G. M., and the summoning him as garnishee, or any time afterwards, any goods, chattels, or effects whatever, of the said W. K. and company, or the survivors or survivor of them, in the hands of him, the said G. M., and this he is prepared to verify. Wherefore, because the said writ of attachment was served on him, the said G. M., and he, the said G. M., was there-

upon summoned as a garnishee separately and distinctly, and not as one of the partners of G. M. and company, and the said G. M. only, and not G. M. and T. F., is named in the said writ of *scire facias*, he prays judgment of the said *scire facias*, and the several proceedings therein mentioned, and that the same so far as they respect him, the said G. M. be quashed, &c.

Edw. Tilghman.

And the said S. B., R. W. P., and J. H., by John F. Mifflin, their attorney, say, that for the reason above alleged their said writ of *scire facias* ought not to be quashed. Because they say that long before the service of the said writ of attachment, to-wit: on the 1st March, 1782, the partnership of G. M. and T. F. under the name of G. M. and company expired, and that on the 18th day of the same month, by a certain instrument of writing, sealed and executed by the said G. M. and T. F. it was agreed between them that all the debts due to the said co-partnership of G. M. and company, by bill of exchange, note, bond, book debt, or upon policies of insurance, should be received by the said G. M. only, who was authorized to give and take sufficient discharges, and that whenever any vessel in which the said co-partnership of G. M. and company were concerned should arrive, that so much only of the proceeds of the cargo as should be sufficient to reload and pay the outfit of the said vessel should be retained, and that the remainder of the proceeds of the cargo should be paid to the said G. M. until the debts of the said co-partnership were fully paid and satisfied.

And the said S. B., R. W. P., and J. H. further say in fact, that the said G. M., before the service of the said writ of attachment, did take possession of the property of the said co-partnership of G. M. and company, and did receive the debts due to the said co-partnership, and the remainder of the proceeds of the cargoes of all such vessels as the said co-partnership were concerned in (after so much of the proceeds of the said cargoes as were sufficient to reload and pay the outfit of such vessels were retained), agreeably to the tenor and effect of the said instrument of writing or agreement, all of which said debts and the remainder of the cargoes aforesaid, were so received by the said G. M. for the express purpose of paying off the debts due by the said co-partnership of G. M. and company.

And the said S. B., R. W. P., and J. H. further say, that long before the service of the said writ of attachment, to-wit: on the 19th March, 1782, the said G. M. did give public notice by an advertisement in one of the public newspapers of the city of Philadelphia, of the expiration of the said co-partnership of

G. M. and company, and by the said advertisement did request that all those who had any demands against the said co-partnership, should call on him, the said G. M. for payment.

And the said S. B., R. W. P., and J. H. further say, that long before the service of the said writ of attachment, to-wit: on the 1st March, 1782, the said co-partnership of G. M. and T. F. under the name and firm of G. M. and company, expired, and that since the expiration of the said co-partnership, the said G. M. has not been a co-partner in trade with the said T. F. using and exercising commerce and trade by the name and firm of G. M. and company, or any other name or firm whatsoever.

And the said S. B., R. W. P., and J. H. further say, that at the time of the service of the said writ of attachment, the goods and chattels, moneys, effects, and credits of the said T. W. and A. L., surviving partners of the said W. K., were in the hands and separate possession, duration, and management of the said G. M. only, and that the said goods and chattels, moneys, effects, and credits were not, at the time of the service of the said writ of attachment, or at any time since, in the hands or possession of the said G. M. and T. F. jointly, or in the hands or separate possession of the said T. F. and this they are ready to verify.

Wherefore for that the said G. M. doth not deny that the said co-partnership of G. M. and company were long before and at the time of the service of the said writ of attachment, indebted to the aforesaid co-partnership of W. K. and company, which said co-partnership of W. K. and company consisted of the aforesaid W. K. T. W. and A. L. whereof the aforesaid A. L. and T. W. have survived the said W. K. and as the survivors of the said W. K. are made the defendants in the aforesaid writ of attachment; and because it appears, that the said G. M. at the time of the service of the said writ of attachment, to-wit: on the 21st October, 1783, and long before, had received and taken possession of the property of the co-partnership of G. M. and company, for the express purpose of paying off and satisfying the debts due by the said co-partnership; and because the said G. M. did give public notice by a public advertisement in one of the newspapers of the city of Philadelphia on the 19th March, 1782 (which was long before the service of the said writ of attachment), and by that advertisement did request, that all those who had any demands against the said co-partnership of G. M. and company should call on him the said G. M. for payment; and because the goods, chattels, moneys, effects, and credits of the said T. W. and A. L., surviving partners of the said W. K. were at the time of the service of the said writ of attachment in the hands and separate possession of the said G. M.; therefore the

said S. B. R., W. P., and J. H. pray that execution for their damages of the goods and chattels, rights and credits of the aforesaid T. W. and A. L., who survived W. K., in the hands of him, the said G. M., be adjudged to them, &c.

William Lewis.

The defendant demurs generally to the replication.

The plaintiffs join in demurrer.

Pending this demurrer, Thomas Woolridge died, and Abraham Lott, the surviving defendant, died after the continuance in September term last, which was verified by the defendant's affidavit. Both their deaths were suggested on the record, and a rule entered in January term last, to show cause why the proceedings against the garnishee should not be staid, and why George Davis, administrator of Abraham Lott, who survived Thomas Woolridge, should not appear to and defend the original suit against Woolridge and Lott, who survived Kelly.

The demurrer was now argued by Messrs. Ingersol and Tilghman, for the defendant, and by Messrs. Lewis and Mifflin, for the plaintiffs.

For the plaintiffs, it was urged that the defendant, by his advertisement, had made himself liable, in his separate capacity, to pay the company's debts.

If one assumes to A to pay to C money on a good consideration, C may have an action for the money. 1 Ld. Raym. 368, 369. So if the promise be to deliver goods to C. Hardr. 321. If A bails money to B, to be delivered to C on demand, C may bring debt against B, because, by the receipt thereof, he made himself debtor to C for the money. Gilb. Cas. in Law and Equ. 362. And cites Brownl. 82. Yelv. 23. Moor. 667. Ow. 127. Cro. El. 729. Debt lies on a deed in these words: "It is agreed that C shall pay unto P 700*l.* for I S's house and the lands in B." 1 Sid. 423. A son, on good consideration, promises to his father to pay 1000*l.* to his sister; she may bring suit on the promise made to her father. 2 Lev. 211.

They further insisted, that under the attachment law of 4 Annæ (1 St. Laws, 44). Attachments shall be served on the goods and chattels of the debtor, in whose hands, or possession, the same may be found. There is no distinction between attaching identical articles, and mere debts or *choses in action*. If a bale of goods had been levied on under this attachment, there could be no doubt of the regularity of the proceedings.

The case of plaintiffs in a foreign attachment differs greatly from those whose process originates by *capias* or summons. In the former they are mere strangers to the garnishees, or their connections in trade; but in the latter they always are, or ought to be, consensant of the adverse parties. No contract is alleged in the *scire facias* against the garnishee, and therefore the *allegata et probata* cannot possibly differ. If an advantage in common cases is attempted to be taken of a secret partner not being named in the writ, the true partnership must be shown in pleading; and the plaintiff may then proceed against the true company by a new writ. But a *scire facias* against the garnishee must pursue the original attachment as levied, and no different *scire facias* can be sued out. Hence, under the defendant's construction of the law, a plain mischief would be produced, and the want of service of an attachment on a person really unknown must necessarily defeat the whole proceedings. If one of the partners of a house, who were garnishees of a foreigner, lived beyond sea, and could not be served, it might thus be pretended that the process was irregular. Whereas, if one partner is arrested in a common cause, judgment and execution may go against him. This would put plaintiffs under foreign attachments in a much worse situation than in the usual mode of proceeding. If one consigns goods to A and B to be sold, he must bring his writ against both; but a creditor of the shipper may attach the goods in the possession of either of the consignees.

If Fitzsimons was insolvent, Meade would be answerable for the whole of the company's debts. Every partner is liable to pay the whole. Their contracts are joint and several. 5 Burr. 2613. There is no inconvenience in bringing a suit against one partner. An execution may be taken out against one, where the action is brought against all. In both cases, the other partner may be compelled to a contribution. 2 Black. Rep. 696, 697.

If a defendant should die before the execution of a writ of inquiry on an attachment, it would certainly abate the suit, and this point has been so determined by Mr. President Shippen, in the Common Pleas of Philadelphia county; but it would be otherwise after the final judgment. The judgment in this case was obtained before the late law reviving suits.

A Court of Justice may impose terms on executors or administrators applying to open common judgments, by directing them to remain as a security. It would be difficult to say what terms could be made in foreign attachments where no special bail is given.

The case before the Court is not altogether new. In Vanuxem

vs. Lockwood, garnishee of Means, in the Common Pleas of Philadelphia county, it was resolved by Mr. President Biddle, that a plea in abatement, alleging that one of the partners was not named, would not hold against the *scire facias*, grounded on a foreign attachment.

It is moreover worthy of much consideration that the last fact stated in the replication is, "that the goods and credits of Woolridge and Lott, surviving partners, were, at the time of the service of the attachment, in the hands and separate possession of Mr. Meade only, and not in the hands and possession of Meade and Fitzsimons jointly, or of the latter separately." This is an independent and separate allegation, and the fact stated is admitted by the demurrer. This exclusive possession of the defendant, of the credits in question, may have happened through the permission of Mr. Fitzsimons, or the consent of the creditors. And in this light, the notable defects suggested, of Fitzsimons not being served with the attachment, or summoned as a garnishee, are wholly without foundation.

The defendant's counsel, in their argument, offered to read the answers of the defendant to the interrogatories filed in the cause, and said that they formed part of the record. This was objected to.

And *per Curiam*. The interrogatories and answers are mere matters of evidence to a jury, but can have no weight in the argument of a demurrer, and cannot now be received.

They then said the object of their special plea was to effect a fair distribution of the property of Woolridge and company, among all their creditors, as it might possibly be objected on the general plea of *nulla bona*, that the partnership of Meade and Fitzsimons could not be given in evidence.

The only doubt on the plea filed arises from the dissolution of the partnership, and the advertisement of Mr. Meade, previous to the attachment levied. But the evident intention of that agreement, and the publication, was merely that Meade should be the agent of their joint concerns. It never was in their contemplation that former rights should be destroyed, nor could anything they did have such possible operation. If Meade had become bankrupt, the creditors of the late company could not have obtained a dividend of his private estate, equally with his other creditors. The clause relied on in the attachment law, is referable to one in possession of goods, but cannot relate to a company owing debts to a foreign house. All the company effects, on Meade's death, would be vested in Fitzsimons, to pay the partnership debts; and in case of Meade's bankruptcy, Fitzsimons, the solvent partner, would have a right to take the

M^cKean, C. J. declined giving an opinion, being one of the trustees of the university, *virtute officii*.

Shippen, J. absents.

Per Yeates and Smith, Justices. It is a virtual purchase by the trustees. In most of the instances before the Court the trustees have, by their agents, bid for the property, which they have been since dispossessed of. They actually bought, though the consideration money was not demanded of them, on principles of public policy, sanctified by law. The introductory words of the 3d section of the act of 22d September, 1785, expressly styles them purchasers, and the 4th section vests them with the title. On these sales there can be no difficulty or doubt whatever.

As to the real estates and ground rents reserved by the Supreme Executive Council, and afterwards approved of and confirmed by the general assembly, they fall exactly within the same reason, and being evicted by titles paramount, the trustees are entitled to a compensation. It was expressly stipulated by the act of 27th November, 1779, § 5, that a yearly income of 1500*l.* should be reserved to them. The good faith and honor of government can only be preserved by a virtuous fulfillment of this engagement. Nor can we see any reason for supposing the legislature meant to use the word "purchase" in the vulgar, and not in the legal appropriate sense of the term.

Inquisitions confirmed.

[Levy and Rawle argued this case for the University.]

[MEMORANDUM.—Died, at his seat, near Frankford, in the vacation, on the 23d August, 1796, William Bradford, esq., late one of the judges of this Court, and attorney general of the United States, *ætatis suæ* 41. His social virtues, affability, and extensive knowledge endeared him to his friends in a peculiar manner; his premature death was generally lamented as a public loss.]

AT NISI PRIUS, AT SUNBURY,

OCTOBER ASSIZES, 1791.

Coram SHIPPEN AND BRADFORD, JUSTICES.

[The reporter has been favored with the reports of the two following cases, determined at Sunbury, October assizes, 1791. *Coram* Shippen and Bradford, justices, by the late Judge Bradford.]

Lessee of JOHN HUGHES *vs.* HENRY DOUGHERTY.

Persons not entitled to pre-emption of Indian lands under the act of 21st December, 1784, who did not occupy the same after the commencement of the war.

Persons may estop themselves, not others, by mutual agreement.

THIS was an ejectment for 324 acres of land, part of the Indian lands in Northumberland county.

The plaintiff claimed under a warrant issued on the 2d May, 1785, for the premises, and a survey made thereon upon the 10th January, 1786. The defendant, on the 20th June, 1785, entered a caveat against the claims of the plaintiff, and on the 5th October following took out a warrant for the land in dispute, on which he was then settled. Both claimed the pre-emption under the act of 21st December, 1784, and, on the evidence given, the facts appeared to be:—

That in 1773, one James Hughes, a brother of the plaintiff, settled on the lands in question and made some small improvements. In the next year he enlarged his improvement, and cut logs to build a house. In the winter following he went to his father's, in Donegal, in Lancaster county, and died there. His elder brother, Thomas, was at that time settled on the Indian land, and one of the "Fair Play Men," who had assembled together and made a resolution (which they agreed to enforce as the law of the place), that "If any person was absent from his settlement for six weeks, he should forfeit his right."

In the spring of 1775 the defendant came to the settlement, and was advised by the Fair Play Men to settle on the premises which Hughes had left; this he did, and built a cabin. The plaintiff soon after came, claiming it in right of his brother, and, aided by Thomas Hughes, took possession of the cabin; but the defendant, collecting his friends, an affray ensued, in which Hughes was beaten off, and the defendant left in possession. He continued to improve, built an house and stable, and cleared about ten acres. In 1778 he was driven off by the enemy, and entered into the army. At the close of the war, both plaintiff

were Toner's. The plaintiff has also declared that he made an improvement for himself in another place. This is the law, and the facts we submit to you.

Verdict for the defendant.

AT NISI PRIUS, AT BEDFORD,

APRIL ASSIZES, 1795.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.

Lessee of JOHN PAXTON *vs.* SAMUEL PRICE.

Recitals in a conveyance are evidence of pedigree. The strict forms of conveyances have not been applied to imperfect rights. Sales of improvements have been proved by parol evidence alone.

THE lessor of the plaintiff claimed under an application filed in the land office, a survey in 1767, and a re-survey in 1786, the expenses of the latter of which he had paid. A deed from divers persons, said to be the children of Charles Sparks (who entered the application), to the lessor of the plaintiff for the lands in question, was shown, dated 23d November, 1786, wherein was inserted a covenant that the youngest son should convey, when of full age.

It was objected that there was not sufficient evidence of the pedigree, and that the plaintiff could not possibly recover the undivided right of the younger son, not having shown title thereto.

Per Curiam. Recitals in a conveyance are evidence of pedigree, the rules in general being much relaxed in this particular. Such inchoate rights as applications have been frequently transferred by mere blank indorsements, and on inspection it appears that he has executed the deed, though his name is not mentioned in the body thereof. The strict forms of conveyances have not been applied to such imperfect rights; and in the case of improvements, it is well known that the sale of them has been proved by parol, and that money, horses, cows, &c., have been paid and delivered, as the consideration to the vendor.

Verdict *pro quer*, with six pence damages and six pence costs. Mr. J Woods, *pro quer*. Mr. Hamilton, *pro def*.

RESPUBLICA vs. JOHN DEVORE.

Statutes formerly construed liberally, on a change of circumstances to receive a strict construction. Indictments for forcible entry and detainer to be discouraged, unless there is an evident force against the party in actual possession.

INDICTMENT for forcible entry and detainer of one messuage, forty acres of arable land and one hundred acres of woodland, in Cumberland valley township, the freehold of John Tomlinson.

It appeared in evidence that Tomlinson was in possession of the premises for eight or nine years, by having tenants thereon, who paid him rent. John Baker, his last tenant, permitted Cornelius Devore, who claimed title therein (the brother of the defendant), to come into possession, in 1792. The defendant cultivated the land for his brother, but no one resided on it. He was asked by the prosecutor, in the spring of 1793, to accompany him to the farm, which he accordingly did, and was there asked to give him possession. The defendant refused, and said he could not, for the right was his brother's. Tomlinson then laid his hand gently on him, and desired him again to deliver up the possession. The defendant stepped back, picked up a stick, and bid him stand off. The prosecutor, who was admitted a witness merely to the force, swore that he felt no fears, but expected to be struck if he had pressed him further.

This case was argued by Mr. Hamilton, for the prosecution, and by Mr. J. Woods, for the defendant, and the following authorities were cited: 1 Hawk. chap. 64, §§ 20, 25, 26, 27, 30, 38, 46; Cro. Jac. 199; 2 Bac. Ab. 563; Crompt. Just. Peace, 69, 70.

By the Court. The statutes of forcible entry and detainer were made for very wise and good purposes, when the spirit of the times was very different from the present. The rights of property are more respected and regarded, and we are induced to flatter ourselves that the necessity of recurring to the laws only for the redress of private or public injuries, is now obvious to every one. Those statutes are still beneficial, but in a variety of instances they have been prostituted and abused. Their provisions, which formerly were construed liberally, should now receive a strict construction from the change of circumstances (Vid. 2 Wils. 40, 41). Proceedings, under these acts of parliament, should be discouraged, unless the party charged has been guilty of an evident force. These laws were made for the security of persons in the actual possession of lands, which can scarcely be said of the prosecutor in this present instance. They require as an indispensable ingredient in the offense, "force and arms, and a strong hand." The defendant was invited on the

lost, some one witness might be produced to prove that it once had existed.

To this the defendant answered, that the first link of the plaintiff's chain of title was bad, as it called for Franks's improvements, which were in fact, made by the father of the defendant. It recited an untruth, and was therefore merely void in itself, by reason of the misrepresentation. If the order of survey was void, every link of the chain necessarily dependent on it must share the same fate; and it is of no consequence when the defendant obtained his warrant, under such circumstances. The possession of the Rudebagh family operated more strongly than a caveat. It was notice to all the world that they claimed title to the lands. As fraud could only be proved *in pais*, it was hoped the parol evidence would go to the jury for their consideration.

Per Curiam. The defendant rests on this, that Mr. Franks has been guilty of a false suggestion. But there is no assertion in the location, that the improvement was made by him, and therefore the ground-work of the objection fails. Yet, suppose it to be otherwise, and still more, that the military permit issued in favor of Christopher Rudebagh (which is highly improbable, under the statements of both parties), how can the parol evidence affect the present question of right? In 1761, the soil belonged to the aborigines. Neither the act of Assembly, nor the proclamation of 1768, gave the settlers, before the Indian purchase, any title to the lands. By the act it was made highly penal, either to make other settlements on the Indian lands, or not to remove from those already made.

On the opening of the land office on 3d April, 1769, it was declared, that "those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward, should have a preference." What does this preference mean? Does it not suppose that an application should be made by such settlers, to the land office, on 3d April, 1769, or in a reasonable time afterwards, for this favor, in order to secure their possessions? Neither old Rudebagh, nor his sons, applied for any supposed preference of these lands, until the month of December, 1784, above fifteen years after the commencement of the plaintiff's title, and this will not be pretended to be in due and convenient time. To introduce witnesses to prove these improvements, would, in our idea, be irrelevant to the point of right, after such great negligence. Such a measure would make the titles of lands, which should be per-

manent and fixed, to depend on parol evidence, and open a wide door to perjury. The testimony therefore must be overruled.

The defendant then offered to prove from the declarations of one Christopher Hayes, that he was the agent of Plumsted and Franks, acted as such at fort Pitt, and among other things put Alexander Somerville into possession, against whom an ejectment was afterwards brought by the now defendant for these lands, and judgment obtained by default in January, 1780.

But the Court ruled, that neither the declarations of Hayes, nor his acts, could of themselves be given in evidence to prove his agency.

And per Yeates, this very point was very fully argued, and determined in bank in the same manner, in Meredith's lessee *vs.* Mauss, January term, 1793.

Verdict for the plaintiff, with six pence damages and six pence costs.

Lessee of DORCAS BOYD, executrix of JOHN BOYD, *vs.* WILLIAM BAGGS and CHRISTOPHER HOCHSTETTER.

Where a variance appears between the declaration and distringas, Court will discharge the jury.

AFTER the jurors were sworn it appeared that there was a variance between the declaration and distringas issued. The former contained two demises, one by Dorcas Boyd, executrix of John Boyd, the other by Matthew Dill and James Dill, each laid on the 2d January, 1789, for 350 acres of land in Huntingdon township. The distringas pursued the titling of the cause as above.

The defendant's counsel agreed to set the distringas right; but the adverse party, finding that their demise was laid before the date of their patent, viz: June, 1789, would not accede to the terms offered. Whereupon the Court discharged the jury, saying they had no such cause before them, but ordered the lessor of the plaintiff to pay the costs of the term.

Messrs. Young and M'Gihan, *pro quer.*

Messrs. Ross and J. Woods, *pro def.*

laches and negligence, as in the remedies to be had against endorsers of promissory notes and bills of exchange.

2. The plaintiff, by proceeding against the special bail, has waived and lost his remedy against the now defendant. He has obtained judgment thereon, assisted by two counsel, and this is perfectly analogous to the case of a plaintiff accepting the assignment of a bail bond. The Court will not afterwards make a rule on the sheriff to bring in the defendant's body, nor can the plaintiff maintain an action against the sheriff for taking insufficient bail.

It was stated, and agreed to, that the general practise before the revolution, in all the western counties, had been, for the prothonotaries to sue bail bonds and take special bail in all suits, as well attachments as others, for the convenience of the practitioners, the latter barely reserving to themselves the liberty of excepting against the special bail at the ensuing Term. 2 Bl. Rep. 1145, and Vaugh. 138, were also cited to show that judges are not liable to answer personally for their errors in judgment; so of single magistrates acting within their jurisdiction.

3. That all the counts charged a combination of the defendant with Brodhead, or his agents, to defraud the plaintiff of his debt, and that no evidence being adduced to prove it, the *allegata* and *probata* did not agree. Neither the Court nor jury would presume a fraud, and, in this instance, the allegation of such turpitude was matter of substance, and not mere form.

Mr. Young, for the plaintiff, answered these objections, and cited 2 Espin. 366. 12 Co. 128. Carth. 487.

And, *by the Court*. Officers are created for the benefit of the community, not for the emolument of individuals. Every public officer ought to know his duty, and exercise it with fidelity, or he will become responsible to the party grieved. The defendant's conduct in the instance before us has been highly culpable, and it has not been accounted for, nor can it possibly be explained to his advantage, if the testimony merits credit. The under sheriff is told by him, in July, 1785, that special bail has been entered, and therefore, delivers up the goods; but he takes the liberty of informing him that he has done wrong. It appears, by the continuance docket, and the defendant's loose memorandum, that the special bail (if taken at all) was not acknowledged until November 22d, following, and this is inserted in the docket after the bringing of this action, by way of defense. This is more than mere mistake of judgment. The defendant's information to the sub-sheriff was a palpable misrepresentation against

the plain duties of his office, and if the plaintiff has suffered thereby he is entitled to compensation. Without animadverting on the practise which is said to have prevailed in these remote counties as to prothonctaries dissolving attachments of their mere authority, without the interposition of a Court, and, taking special bail, it will not be pretended that the defendant can shelter himself under this usage. Indeed, from the taking of the judgments, with the stays of execution, issuing the *ca. sa.* and he *scire facias*, it would appear as if some agreement had been entered into by the counsel. Of that agreement we have no testimony. But it must be observed that the plaintiff's counsel could not find the recognizance of bail on the most diligent search, and it is therefore most probable that the suit on the *scire facias* was instituted for the defendant's benefit. There can be no doubt but that the judgment against M'Donald is a mere nullity, the *scire facias* containing no certain demand against him, and being void in itself. No appearance of counsel can cure it in its present state. It appears to us that the action is proved in substance; but, at any rate, the combination, if necessary to be proved, may be fairly inferred from the circumstances, and that the plaintiff is entitled to recover his debt and interest.

Verdict *pro quer.* 240*l.* 4*s.* 4*d.*

AT NISI PRIUS AT WASHINGTON,
MAY ASSIZES, 1795.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.

Lessee of SAMUEL HOWARD *vs.* JOHN POLLOCK and JOHN BURK.

Application for leave to amend *narr.* in ejectment cannot be made as *Nisi Prius*. Claims under improvements may be deemed imperfect rights to lands, and depend on a variety of circumstances.

Awards not pursuing the submission cannot be received in evidence.

EJECTMENT for a messuage of 318 acres of land in _____ township.

Previous to the jury being sworn, Mr. Woods, for the plaintiff, finding that the day of his demise was laid before the date of the warrant under which he claimed, and that the term had expired, moved the Court for leave to amend the date of the demise and to enlarge the term.

The funding law of 16th March, 1785, § 31, directs that improvements shall be subject to taxation, and thereby recognizes those claims.

The limitation act of 26th March, 1785, § 5, declares that no persons claiming lands in consequence of any prior settlement, improvement, or occupation, *without other title*, shall recover the same, unless they have had the peaceable possession thereof within seven years before action brought; with a proviso in favor of persons driven from their possessions by the savages, &c (2 Dall. St. Laws, 28). Now it is evident that here is a necessary implication from the words of the law, that an ejectment may be maintained under a *prior settlement, improvement, or occupation*, where there has been a possession within seven years next before the commencement of the suit, by the party, his ancestors, or predecessors.

As to the argument drawn from the penning of the preamble of the act of 30th December, 1786, it may be obviated by considering that it arose from the abundant caution of the legislature, and from some former decisions at law.

By the Court. Cases of improvements depend on a great variety of circumstances, all of which must be taken into consideration by a jury. The practise of the late proprietary land office, and divers laws since the revolution, have annexed to them certain claims,* so that they may be now classed among the *imperfect rights* to lands. It is a matter of fair argument, when the tes-

*Besides the laws cited, see the act for raising 5,700,000 dollars, passed 10th October, 1778, which declares, § 11, that lands held by improvement are thereby made taxable.

Act for emitting 500,000*l.* in bills of credit, passed 7th April, 1781, which enacts, § 7, that together with the guarantee of the state, so much as shall be sufficient of the arrears due for lands heretofore granted or claimed by virtue of warrants, locations, surveys, or any other title that might be deemed good and valid according to the law, custom, or usage in force under the late government, shall be pledged as a fund out of which the said bills of credit shall be redeemed, &c.

Act passed 5th April, 1782, instituting a board of property, to hear and determine in all cases of controversy, touching escheats, &c., *rights of pre-emption, promises, imperfect titles, or otherwise*, which may arise in the land office (2 Dall. St. Laws, 21).

Act passed 12th March, 1783, § 6 (2 Dall. St. Laws, 90).

Act passed 22d April, 1794, § 2, directing that no warrants shall issue after 15th June, 1794, for the lands therein mentioned, except in favor of persons claiming under some settlement and improvement.

Act passed 22d September, 1794, § 1, declaring that after passing of the law, no application shall be received in the land office for any lands, except such whereon a settlement has been or thereafter shall be made, grain raised, and a person or persons residing thereon.

timony is given, what will be its operation? We will therefore hear the evidence. It is a more favorable case than improvements generally are, there being an agreed line between the parties, if the plaintiff should bring home the knowledge of that fact to Pollock before he purchased.

In the course of the trial a bond was shown in evidence dated 8th January, 1778, in the penalty of 500*l.*, executed by Howard to Pollock, conditioned to perform the award of David Scott, John Glasgow, Leonard Robinson and Ezekiel Moore, and *such others as these four shall choose*, respecting the land in dispute between them.

An award subscribed by Scott, Robinson, and one Samuel Swindles (mutually chosen by the other arbitrators), was then offered in evidence by the defendants and excepted to, because not within the submission of the parties; and 1 Bac. Ab. 137, 138, was cited.

The Court expressed regret that they were under the necessity of overruling the evidence. It very probably was the honest intention of the parties, that a majority of the arbitrators should determine the dispute; but it is not so expressed in the bond, nor can the Court intend it, or suffer the defect to be supplied by oral testimony. 1 Espin. 247.

The jury found a verdict for the plaintiff, and established the agreed marked boundary.

AT NISI PRIUS, AT UNION TOWN.

MAY ASSIZES, 1795.

Coram M'KEAN, CHIEF JUSTICE, AND YEATES.

Lessee of THOMAS SMITH, ESQ., *vs.* BAZIL BROWN.

Declaration in ejectment altered after the jury was sworn, to make it conformable to the record.

A prior improvement under Pennsylvania, shall prevail against a Virginia certificate, under the compact between the two states.

Between claimants under Virginia, the certificate of the commissioners is conclusive. *Aliter*, where one of the parties claims under a Pennsylvania.

EJECTMENT for one messuage and 280 acres of land in Menallen township.

On motion of Mr. J. Woods, for the plaintiff, the names of Francis Pursley and Benjamin Brashiers were struck out of the declaration in ejectment, after the jurors were sworn, and the

sell his interest therein to the defendant, the sheriff might at an anterior period, take the same in execution. Should it be pretended that his sale overreaches the judgments and executions, the *onus probandi* lies on the party affirming this fact. If it was by writing, let the written instrument be produced; if it is lost, or was by mere parol, bring forward the witnesses. The offering no proof of the sale, under the present circumstances, is strong evidence that the defendant does not wish to play a *fair game*. He affirms the *jus proprietatis* in William Brashiers, by accepting his assignment; and if it was posterior to its being levied on, the premises would be subject to the lien. All persons are bound to take notice of the judgments of Courts of Record, and it is more than probable that the defendant actually knew of the lands being seized on, from the inquisition being held at the house of his brother Thomas, nigh thereunto, and its notoriety in the country. Suppose he had a real, honest claim to the lands, either under Brashiers, or otherwise, and he was informed of the sheriff's advertisements, he should have given notice at the sale, to prevent the purchaser from being deceived by payment of his money. Failing herein, he shall be postponed, as in the case of a first mortgagee silently permitting another to lend his money on the security of the same lands; or one having a title to lands, and suffering another to expend his property in building thereon, without giving him notice of his right. 2 Vern. 151. 9 Mod. 37, 38. 1 Wms. 394.

There can be no doubt but that on every principle of moral and political obligation, the compact between the two states should be held sacred. And this brings it to the question, whether William Brashiers' improvement is the elder or prior right, under Pennsylvania. So wild and extravagant have been the notions of many people about improvements, that it is not easy to define them. In the language of the act of 30th December, 1786, it is understood to be "An actual personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war." The settlement in question clearly comes within this description.

There are three kinds of rights: *jus proprietatis*, *jus possessionis*, and *jus vagum*, or an imperfect right. Settlements may be ranked among the latter species. It has a right to pre-emption; a claim to a favor.

William Penn, esq., the first proprietary, died in England, in 1718, and his son Thomas continued in his minority until 1731, Richard, his other son, until 1732. In this interval their land

office was shut up, so that during that time warrants and patents were not regularly granted by the commissioners of property for transferring land to applicants. To further the settlement of the then province within that period, tickets signed by one of the commissioners of property, or by the secretary of the land office, came into practise. Hence, it would seem, sprung improvements. The old rule being once relaxed, greater liberties were taken by the people, and emigrants from abroad often seated themselves on vacant lands (see act of assembly passed 27th November, 1755, Miller's ed. vol. 2, p. 55) without permission, and made valuable improvements. The usage of the proprietary land office was favorable to these settlements. The interests of the proprietaries were promoted, and the pre-emption of the lands they occupied was generally considered as belonging to the settlers. The inhabitants of the frontier counties, in particular, availed themselves of the usage, and in many instances went much further than was ever intended by the lords of the soil, or their officers.

When land office, for the sale of the lands purchased at Fort Stanwix, was opened, on the 3d April, 1769, "Those who had settled plantations were declared to have a preference;" and many judicial decisions were conformable thereto. The acts of 27th November, 1755, 10th October, 1779, and 16th March, 1785, make improvements subjects of taxation. Several other laws since the revolution are favorable to real settlements, and particularly the limitation act of 26th March, 1785, which presupposes that under the received usage a recovery might have been before legally had under a prior settlement, improvement, or occupation, where there had been an attendant possession within seven years before the suit brought. The former custom of granting the lands to real improvers is clearly hereby recognized. And this custom is much older than the Virginia act of 3d May, 1779, which gives, for the first time, a preference to settlers "Who had made a crop of corn, or resided on the lands one year before the 1st January, 1778." There can be no reason for making a distinction between the settlers under Virginia and Pennsylvania. Between claimants under Virginia, the certificate of the commissioners is conclusive evidence, but not where one of the parties claims under Pennsylvania. And so have been all the decisions. Under all the circumstances of the case before us, we think that the plaintiff is entitled to recover under every principle of law and equity.

Verdict for the plaintiff.

Lessee of WILLIAM LYNN, ANDREW LYNN, JOHN LYNN, AYRES LYNN, ISAAC LYNN, and JOHN CORBLEY, junior, and ANNA, his wife, *vs.* THOMAS DOWNES.

In a declaration in ejectment, repugnant words considered as surplusage. Assignment of an application for lands without words of inheritance, for valuable consideration, will pass an estate in fee simple.

Intention of a testator must be gathered from the words of his will, taken all together.

EJECTMENT for a messuage and 151½ acres of land.

The declaration stated the demise on the 23d July, 1790, to hold *from* the same day, and that the lessee by virtue of the demise aforesaid, entered therein; and that the defendant *on the same day* afterwards ejected him.

Mr. J. Ross, for the defendant, excepted to the declaration. The nominal lessee could not enter until the 24th July, the word *from* being exclusive. The ouster of the lessee on the 23d was no wrong to him, because he had then no title. From the plaintiff's own showing, his right to enter on the same day he was ousted is defective. Some of the cases have gone a considerable length, where exceptions of this nature have been taken after verdict; but the objection is made thus early to prevent any conclusions being drawn from a verdict.

Messrs. J. Woods and Young, *e contra*, cited Bull. Ni. Pri. 103 (4th ed.), and Cro. Jac. 96, as expressly in point.

Per Curiam. The declaration states that the plaintiff entered by virtue of the lease, which he could not do until the 24th July. The words of ouster, *on the same day*, are repugnant thereto, and may be considered as surplusage. The time of entry of the nominal plaintiff is not specified. We think the exception cannot be supported. Ejectments are the creatures of the Court, and subject to their peculiar interposition for the advancement of justice. Great liberality is now used in these matters (2 Burr. 1161; 1 Barnard, B. R. 54). The defendant's counsel may, however, if he thinks proper, move the Court in bank, on a point as reserved, saving to him every advantage to which he is now entitled.

The case on evidence turned out as follows:—

The lessors of the plaintiff claimed as heirs at law of their father, Andrew Lynn. The defendant claimed a child's share, as son of Thomas Downes.

Thomas Downes, the father, filed an application in the land office for 300 acres in Redstone settlement, including his im-

provement, on 3d April, 1769. He made his will on the 2d March, 1778, and died, leaving thirteen children, of whom nine are still living. His will run thus: "I give and devise *all my real and personal estate* to my widow, Gulielma, except 6*l*. which I bequeath to each of my children; and I allow the line between me and my son-in-law, John Jones, to stand firm. I appoint my said widow and my son Jeremiah my executors." He then subjoins the following memorandum: "It is my will that my *heirs* or *executors* is to have the one-half of the land, which is 166 acres, and no more, and John Jones to have the other half, according to our agreement." He had before made a division of the land, with his son-in law.

On the 21st October, 1788, the widow and executrix and three of the children convey their shares and interests to Benjamin Brashiers and his heirs, in consideration of 20*s*. per acre; and on the 28th March, 1789, Brashiers, by an assignment indorsed on the former bill of sale, "Sells and transfers all his right, title, and interest in the within writings, to Andrew Lynn" (the father), "for value received," without using any words of inheritance therein.

On the 24th September, 1789, Jeremiah Downes, the other executor, conveys all his right and interest to the said Andrew Lynn, in consideration of 15*l*.

On the 29th September, 1783, a warrant issued to re-survey the lands for the use of John Jones and the heirs of Thomas Downes, according to his will, on which a re-survey was afterwards returned, containing 151½ acres, and the usual allowance.

The questions between the parties turned upon the construction of the deed from Brashiers to Lynn, and of the will of Thomas Downes.

It was contended for the defendant, that Brashiers's deed, containing no words of inheritance, passed no more than an estate for life to Lynn, which was now spent; and therefore, the plaintiff showed no title to the lands. The rule of law was so clearly settled that, in deeds, the word "heirs" was indispensably necessary to vest an estate in fee simple, it could need no animadversion.

Gulielma and Jeremiah Downes do not convey as executors; they merely transfer their own shares of the land. So of the three children who have executed the deed. And the opinion of the family, as well as the grantee, is a good criterion to judge of the testator's intention. The warrant of re-survey was taken out by joint consent, for the common benefit of all the issue. The 6*l*. legacy to each child is not made payable out of the

lands. The expressions in the conclusion of the will are clear who shall have the lands; not his widow, but his heirs or executors; the latter, if they shall find it necessary to sell for payment of debts; the former, if they shall discharge the debts themselves. This clause narrows and restrains the operation of the general words "real and personal estate," in the devise to his widow, in the first sentence.

But, *by the Court*. The operation of applications and surveys thereon is best explained by the usage of the state; and as that usage alters, so will the law. No such titles are known in England, and the strict rules of law there are inapplicable to our system. An application is the mere inception of a title, on which no more is paid than 7s. 6d. the mere office fees of entering it. It vests a mere equitable interest in the party, the legal estate remaining in the commonwealth in trust. The right is eventually completed by obtaining a patent.

We have often seen that rights under applications and warrants, also, have been assigned by blank indorsements, and that the sale of improvements has taken place by the payment of money, or the delivery of a specific article by way of consideration; and such transfers and sales have always been established. This point was resolved at Bedford, during our present circuit, in Paxton's lessee *vs.* Price.

In the instance before us, the subject matter must be considered; and Brashiers's assignment conveys to Andrew Lynn all his right, title, and interest in the *within* writings. It refers to the other conveyance on which it is indorsed.

The intention of the parties is clear. The title passed for a valuable consideration, and the money paid raises an use which chancery would carry into execution. It operates as a statute conveyance; and we apprehend that the vendor would be considered as a trustee for the vendee, and consequently, that all his equitable interest passed to the ancestor of the lessors of the plaintiff.

The will is obscurely penned; but the intention of the testator, extracted from the words of the will, taken all together, shall govern its construction, and not the opinion of his family. The first words are clear and explicit, and convey an estate in fee simple to the widow, chargeable with 6l. to each child. The thirteen children would then get 78l. clear of all deductions; which, under the known circumstances of the country, laboring under an Indian war, and the claims of Virginia to the soil, would not be an inadequate provision, when his widow's main-

ance is taken into view. It will be difficult to account for the principle on which he devised 6*l.* to each of his children, if he intended that beyond that amount they should equally inherit all his lands.

It is said that the concluding clause of the will is repugnant to the first devise to his wife, and must restrict the meaning of the general words he had before used. But who, under this construction, were then to take? His issue, or his executors? It is wholly uncertain; and if there had been no former devise of the lands, this devise would have been void on that account, and could not take effect. On both points, therefore, the verdict should be for the plaintiff.

Verdict *pro quer.*

Lessee of RALPH CHERRY *vs.* WILLIAM ROBINSON.

One guilty of laches in not endeavoring to procure a survey on his application in the land office, shall be postponed.

One in possession of lands, under a legal title, sells to a purchaser *bona fide*, without notice; an equitable title, by improvement, shall not affect him, nor be received in evidence. After three trials in ejectment, Court will stay proceedings.

EJECTMENT for a messuage and 337 $\frac{1}{2}$ acres of land, in Bullskin township.

The merits of this cause came on for trial the fourth time.

The now defendant commenced an ejectment for the lands in question against Adam Hatfield, in Bedford county, on which a verdict passed for the plaintiff, in January term, 1772, and judgment was entered thereon. He then renewed his ejectment, which was removed to the supreme Court, and was tried October assizes, 1788, when a verdict was given in the same way; and on a new trial being ordered by the Court, a third verdict was had for the defendant at June assizes, 1790, on which judgment was rendered for him.

The outlines of the case were as follows:—

In 1767, Adam Hatfield chopped a few cabin logs and girdled some trees on the crossings of Jacob's creek; and in the ensuing year he cut more logs, deadened some timber, made some brush heaps, and collected a number of people together to raise a cabin for him; but they were prevented by a fall of snow.

On the 7th April, 1769, he entered an application in the land office, for 300 acres of land, about two miles above Braddock's road, where it crosses Jacob's creek, on both sides of the said creek. In the month of April or May, 1769, he raised a cabin on the land, and lived in it with his brother. In the fall of the same year, he applied to William Thompson, esq., deputy surveyor of the district, to survey his lands, but he evaded it for the present; understanding, however, a few days afterwards that

John Boyd, a deputy under Thompson, had surveyed his intended tract for James M'Elwaine, under a later order, he immediately complained of this conduct to Thompson, who excused himself as well as he could, promised to return the survey in dispute, and that he would enter a caveat for him, both which he neglected to do.

In 1785, Hatfield having made considerable improvements on the lands, conveyed the same to the now plaintiff's lessor, in consideration of 100*l.*, who continued in possession until lately, when the defendant, by repeated encroachments, obliged him to become plaintiff in a new ejectment. In 1786, a survey was made by Alexander M'Clean, deputy surveyor, and returned on Hatfield's application; and on the 29th November, 1787, a patent issued to Cherry, in consideration of 33*l.* 10*s.*

The defendant claimed under an application in the name of James M'Elwaine, entered on the 13th June, 1769, descriptive of the lands, a survey made by William Thompson, on the 11th November, 1769, containing 321½ acres, a conveyance from M'Elwaine to the defendant, in consideration of 10*l.*, dated 14th November, 1769, and a patent issued to him 12th January, 1771.

It appeared on the trial that M'Elwaine's name was made use of in the application, for the joint benefit of a company, consisting of the said William Thompson, John Boyd, Joseph Erwin, and Wendle Ourey. The defendant was present when the survey was made by Boyd, under the location of M'Elwaine, and knew that Hatfield was in possession and claimed the land. This survey was conducted with privacy on a Sunday, and from some circumstances it became probable that it was not made until after the date of M'Elwaine's bill of sale.

After a full discussion of the merits, by Messrs. J. Wood and Young, for the plaintiff, and Mr. J. Ross, for the defendant,

M'Kean, C. J., in his charge to the jury, stated the written and parol testimony very fully.

He then observed that the plaintiff had given very material evidence, which had not been produced on the former trials. The requisition made to Thompson, at an early day, to make the survey, the co-partnership existing against the now plaintiff, and the knowledge of the defendant of the lands being in dispute before he purchased, were now first brought forward and operated with great force in behalf of the plaintiff.

If the plaintiff had been guilty of laches, in not procuring a survey for a number of years, or endeavoring by proper means to procure one, he ought to suffer for his negligence. Diligence

in such matters, forms an essential feature in titles on locations; and the claimant who idly stands by, and suffers other surveys to be made without prosecuting his claim, shall be postponed. The knowledge of the defendant of the dispute, and of Hatfield's possession, were also material circumstances to be proved; because if one in possession had a legal title, and had sold to a purchaser *bona fide* and without notice, an equitable title by improvement, shall not affect him, nor indeed ought it to be suffered to go to the jury in evidence. (Vid. Talb. Cas. 187, 258, 260. 2 Freem. 43. 3. Cha. Ca. 123. 2 Black. Com. 329, 337.)

When the defendant purchased, he most probably bought the application only, and the survey was made afterwards. The bill of sale, in the hand writing of Boyd, one of the company, though very full in other particulars, does not specify the survey, or quantity of acres, though on the face of the paper it would appear the lines were run by Boyd himself, but three days before, and one of the witnesses swears that the survey was not made until the succeeding year.

Here then, independent of Hatfield's improvement, which need not be taken into view, the plaintiff has the earliest descriptive application; and his warrant, survey, and patent shall, like the different parts of a common recovery, all refer back to the first act, and will therefore over-reach the defendant's title. He and Hatfield have been in uniform possession since 1796, until the defendant has, by finesse, elbowed him out of part of the land, His title has been sanctioned by the verdicts of three successive juries, and no good reason has been offered to us why he should not now succeed.

The jury found a verdict for the plaintiff, without leaving the bar. The Court then told the defendant that four different juries had united in opinion, concerning the title. It was high time peace should be restored between them; but if he still meant to contend the right, and worry his adversary out, Courts of justice would interpose their authority, and prevent him from dragging his opponent into future vexatious law suits. As equity would decree an injunction after three trials, so would Courts in Pennsylvania stay his further proceedings, by their summary powers, for the ends of justice. (Vid. Sel. Cha. Ca. Temp. King 13. 2 Equ. Ca. Ab. 522. 1 Wms. 672. 2 Bro. Parl. Ca. 217. 1 Stra. 404. Bunb. 158.)

SEPTEMBER TERM, 1795.

Present — M'KEAN, CHIEF JUSTICE, — SHIPPEN, YEATES, AND SMITH, JUSTICES.

STEPHEN AUSTIN, JEREMIAH WADSWORTH, and JOHN CHURCH *vs.*
MATTHIAS SLOUGH.

If the payee of a note pay the balance thereof to an indorsee under a judgment against him, after the bankruptcy of the maker, and after such indorsee has procured his dividends from the assignees, by the direction of the payee, he can recover against the maker, notwithstanding his bankruptcy and certificate.

THE plaintiffs declared in case, on three counts, 1st, for 120*l.* had and received to their use; 2d, for 120*l.* laid out and expended for the defendant's use; and 3d, for 120*l.* lent to the defendant on the 28d November, 1793.

The defendant pleaded *non assumpsit* and payment, and that he was a certificated bankrupt.

It appeared in evidence that the defendant gave his promissory note to the plaintiffs, or order, on the 13th September, 1785, for 225*l.* 8*s.* 4*d.* payable with interest in sixty days, who indorsed it to William Crammond on the 12th July, 1786. One ton of bar iron, amounting to 28*l.* was received by Crammond on the 2d December, 1786, and indorsed on the note, and he was afterwards paid the sum of 108*l.* 8*s.* 8*d.* on account of the note, and then paid it over to John D. Blanchard, without indorsement.

The defendant committed an act of bankruptcy on the 14th June, 1787, and on the next day a commission issued against him; and on the 15th June he was declared a bankrupt by the commissioners.

Blanchard, after the failure of the defendant, delivered the note to Reed and Forde, in payment of goods, and promised that if the plaintiffs should not take up the same, he would discharge it. Upon application to the plaintiffs, Reed and Forde were desired to call on the assignees of the defendant and receive what dividends they could, and were promised the balance by the plaintiffs. In consequence hereof they received four different dividends from the assignees, amounting to 38*l.* 12*s.* 3*d.*, and afterwards brought a suit against Austin, one of the plaintiffs, and upon a recovery had against him in November, 1793, Austin paid 116*l.* 15*s.* 1*d.* the balance of the debt and interest, and 14*l.* 11*s.* 1*d.* costs. The present suit was commenced to recover over from the defendant the moneys which had been thus paid. [Vide 2 Yeates, 15.]

The plaintiffs insisted that on their endorsing over the note, they ceased to be the creditors of the defendant. They had no legal security for a debt, which they could have proved at the time of his bankruptcy. They had parted with the evidence of their right. If the payee of a note pay the amount of it to an endorsee, after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. 4 Term Rep. 714. (See the case *ex parte* Brymer, cited 4 Term Rep. 715. Cook's Bank Law, 2d ed. 204.) A surety in a bond who pays the debt *after* a commission of bankruptcy issued against his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. Where the cause of action, though it arises after the bankruptcy, is founded on a pre-existing ground, it is not barred. Cowp. 525. Cook's bank. L. 1st ed. 154. Contingent debts cannot be proved under the stat. 7 Geo. 1, c. 31, and debts payable at a future day are not to be proved, unless they come within the statute. Cowp. 460. Bail, who had not paid the debt and costs until after the bankruptcy of the principal, though judgment on the bail bond was had before, are not barred by the certificate of the bankrupt, because until actual payment there was no damnification. 3 Wils. 17, 262. 2 Bl. Rep. 794.

For the defendant it was urged, that the construction contended for by the adverse party would effectually defeat the intention of the legislature in their act of 1785, "for the regulation of bankruptcy." Under the 24th section of that law, if a bankrupt shall be impleaded for any debt *due* before he became bankrupt, such bankrupt shall be discharged on common bail, and may plead that the *cause of action* did accrue before such time as he became a bankrupt. And by section 26, if any certificated bankrupt shall be taken in execution, on account of any debt *owing* before he became bankrupt, by reason of a judgment obtained before the allowance of his certificate, he shall be discharged by any judge of the Court, wherein judgment was obtained. 2 Dall. St. Laws, 377, 378. The words, *cause of action*, in one of the British statutes of bankrupts, have been held to mean such a debt as is due, and owing, and payable in all events. 3 Wils. 271. The defendant's liability on the present note to the payee, and the different endorsees, is clearly within this description. Formerly, a bankrupt was considered as a criminal, whose delinquency could be expiated only by paying the last farthing, but in more modern times, his interest has been in some measure provided for, and he is now rather viewed in the light of an unfortunate man. 4 Reeve's E. L. 255. 2 Bl. Com. 477,

482. Bankrupt and insolvent laws are now construed favorably. 4 Burr. 2525, 6.

An endorsee of a promissory note, payable three months after date, may be discharged under an insolvent act which takes place before the three months. Cowp. 22.

If the cause of action arise before bankruptcy, interest and costs accrued since are likewise discharged by stat. 12, Geo. 3, c. 47, § 2.

In mercantile life, the absolute necessity of the use of promissory notes and bills of exchange is well known. But under the plaintiff's doctrine, no merchant who has passed such paper, can in case of subsequent misfortunes and failure, be exempted from arrests, nor his future property be protected, notwithstanding the fullest conformity to the bankrupt laws. An endorsee, or payee, may suffer judgment to go against him afterwards, and then recur to the unfortunate bankrupt.

If the plaintiffs had paid the moneys for which they were liable, at any time anterior to the 14th June, 1787 (which they were bound to do by the custom of merchants), it cannot be pretended that they could have the most distant claim on the defendant. Shall they then take advantage of their own laches in not paying during the period of eleven months, according to the terms of their engagement? The ground on which it is insisted, that this demand is not protected by the defendant's certificate, is, that the plaintiffs could not prove it under the commission. But it was, in fact, proved by Reed and Forde, and they received their full dividends by the direction of the plaintiffs. They may be considered as the agents of the plaintiffs in this particular. The same advantage was derived to the plaintiffs, as if they themselves had the evidence of their right in their own possession, and had in person exhibited the note. They were credited with the dividends received, and only paid the balance to Reed and Forde. This material circumstance distinguishes the present case from all those cited by the plaintiffs.

The Court thought the case a hard one on the defendant, and inclined, under all the circumstances, to an opinion in his favor; but to settle the point, on full reflection, they recommended that a verdict should be given for the plaintiffs, subject to future discussion, whether the debt and costs were recoverable by law from the defendant. This was at first acquiesced in by the defendant's counsel, but the jury could not be prevailed on to give a verdict against the defendant. Whereupon the plaintiffs with-

drew a juror, and moved for a trial by a special jury, which was granted them.

Mr. M. Levy, *pro quer.*

Mr. J. B. M'Kean, *pro def.*

BENJAMIN LEEDOM and JOSEPH LEEDOM vs. JONAS PHILIPS.

On a contract of sale of goods, the property is immediately divested out of the vendor, unless it be otherwise agreed; and even then, the vendor may, by his conduct, renounce the benefit of the conditions stipulated.

Replevin for seven boxes of Havana sugar, of the value of 114*l.* 16*s.* 10*d.* Plea, property in the defendant.

It appeared in evidence, that the plaintiffs contracted with one Samuel Edwards, to sell and deliver to him these sugars on the 4th August, 1794. The porter was directed by the plaintiffs to place the boxes on the pavement before Edwards's store, and to give them notice when he was about to remove the last parcel. This was done accordingly, and the articles were carried from the plaintiffs' store, on the morning of the next day, about nine o'clock, and one of the plaintiffs went with the last load and bill, to receive the money. Edwards was not at home, and the party returned to his house, leaving the boxes before the store door. About three o'clock in the afternoon of the same day, the sugars were sold by Edwards to the defendant, and removed to his store. Within two hours afterwards, Edwards failed. On the morning of the same day, Edwards was observed in tears, conversing with the defendant, near Callowhill market. The plaintiffs, on the 30th September following, gave a letter of license to Edwards, with his other creditors, and Edwards, in the month of April, in the succeeding year, in conversation, did not deny that he was to pay for the sugar on its delivery.

The defendant showed a bill of parcels for the sugar, from the plaintiffs to Edwards, dated the 4th August, which he insisted on having received from the latter when he made the purchase, and two receipts of the plaintiffs to Edwards, the one for \$5,000 in his notes dated 12th March, 1794, and the other for \$2,000 in his notes likewise, dated the succeeding day.

The waste-book and ledger of the plaintiffs were submitted to the inspection of the jury, but erasures had been made in both, altering the charges from the 4th to the 5th August. It also appeared thereby, that merchandizes to a considerable amount were charged against Edwards, on the 14th and 30th days of July, preceding, and no entries of cash paid thereon.

Messrs. Ingersoll and Wells, for the plaintiffs contended that it appeared from the circumstances of the case, that the contract for sale of the goods was for ready money to be paid by Edwards, and that the depositing them on his pavement was no complete delivery. The bargain was *conditional*, and depended on the receipt of the cash; so was the delivery. The plaintiffs have done nothing in renunciation of their right of immediate payment. Where goods are sold for ready money, the property is not altered unless the money be paid. 2 Pow. on Contracts, 63. 3 Salk. 61, 62. Bull. 50 (4to edit). Gilb. Law Evid. 206, 207. Every species of delivery of goods will not alter the property. Cowp. 61, 62.

A merchant consigns goods from abroad to one who becomes insolvent. Consignor may stop the goods at any time after their arrival in port, before they get into the hands of the consignee. Ambl. 399.

They also insisted that there was reasonable ground to presume a collusion between the defendant and Edwards, to defraud the plaintiffs of their sugars. Fraud is a concealment of anything material, which concerns the other party in interest. 2 Atky. 561. It will vitiate every contract, as in the instance of one buying goods with intent to defraud an execution. 1 Burr. 474. A fraudulent bill of sale of goods by a bankrupt to a creditor, in order to keep up his sinking credit,—to prefer one, and to cheat others,—is void. 4 Burr. 2477.

Messrs. Moses Levy and J. B. M'Kean, for the defendant, urged that here was a complete delivery of the goods, with the assent of the vendee, which changed the property. It does not appear that the contract was made for ready money. It is obvious, from the books produced, that the usual course of the plaintiffs' dealings with Edwards was not for cash, and here the plaintiffs have delivered him a bill of parcels on the sale of the sugar. All the cases show that a delivery of the goods divests the property.

Fraud is not to be presumed; and the slight ground to suspect one, in this instance, is, that the defendant conversed with Edwards in the public street, on the morning of his failure, and Edwards appeared in distress.

The Court, in their charge to the jury, said that two facts presented themselves to their consideration: 1st, whether the goods were sold for cash, to be paid on the delivery; and if so, 2d, whether the plaintiffs, by their conduct, had waived the condition of the immediate receipt of the money.

On the first point, the jury were in possession of all the facts,

the bill of parcels, and the books of the plaintiffs, and could form their judgment on the whole collective evidence.

The second point occurs, supposing the agreement to have been for ready money. It appears that the boxes were placed before Edwards' door, and continued there six hours before they were removed. If the delivery on the pavement was intended as merely conditional, and to depend on an actual payment of the money, the porter should have been informed of it, and he or some one else should have retained the custody of the sugar, that Edwards might thereby be informed of the only terms on which he could receive the possession. This would have qualified and restrained the legal operation of the delivery, and no inconvenience could arise to a fair purchaser who had paid his money for property in the visible possession of Edwards. A delivery may be made in a very slight manner, as where one buys goods in a room, the receipt of the key is sufficient. The change of property depends on the assent of the owner, and the right of the vendor is divested immediately after the contract of sale is made in favor of the vendee, *unless it be otherwise agreed*. 2 Pow. Contr. 63. When the parties specially agree, it is obvious that the vendor may, by his contract, renounce the benefit of the conditions stipulated, and trust to the good faith of the vendee for a future performance on his part. If one sells goods for cash, and the vendee takes them away without payment of the money, the vendor should immediately reclaim them by pursuing the party, and he may justify the retaking of them by force.

If the minds of the jury are satisfied that there was collusion between the defendant and Edwards, it will vary the case, since fraud will vitiate every contract. But there must be more than suspicion to warrant such an inference. If the sale of the sugar to the defendant was *bona fide*, it ought to prevail. The plaintiffs should suffer by their own remissness, and not an innocent purchaser.

Verdict for the defendant.

SAMUEL HADDON vs. ARTHUR CHAMBERS.

A surety in a bond who pays the debt after his principal has been discharged by the bankrupt law of Maryland, is not barred by the chancellor's certificate.

THIS was a case stated for the opinions of Justices Shippen and Smith, who sat at *Nisi Prius*, at the last May assizes for Huntingdon county.

The action was brought on a promise of indemnification for money paid, laid out, and expended for the defendant's use.

On the 3d October, 1787, the plaintiff executed a joint and several bond as surety for the defendant, and at his instance, to William Thompson, conditioned for the payment of 14*l.* 12*s.* 6*d.* and interest, within one year. On the 15th July, 1788, the defendant was discharged, under the insolvent laws of the state of Maryland, and obtained a certificate from the chancellor of that state that he was a bankrupt, and was duly discharged from all debts by him owing or contracted. The plaintiff was afterwards obliged to pay 19*l.* 19*s.* 3*d.*, the amount of the principal and interest on the bond to the obligee, and the defendant, on being arrested, was discharged as a citizen of Maryland, under a *habeas corpus* issued from the Supreme Court.

The question referred to the justices was, whether under these facts, the plaintiff was entitled to recover?

Mr. Hamilton, for the defendant, contended, that though the action might lie under the laws of England, yet it was otherwise in the present instance. The Maryland act was passed in April, 1787, c. 24, and enacts, that "Such debtor shall forever thereafter be acquitted and discharged from all debts by him owing or contracted, at any time before the date of such deed," to trustees of his estate. It is materially different from the British statute which contains the words, "due and owing." Cowp. 23. The words *owing and contracted* are sufficiently comprehensive to reach any pre-existing ground of action, and the *lex loci* must govern.

Messrs. Walker and R. Smith, for the plaintiff, insisted that the damage did not happen until after the bankruptcy of the defendant, and therefore the plaintiff could not prove his demand under the commission. The certificate of the bankrupt does not discharge a contingent debt. They cited Cook's B. L. 342, 344. 3 Wils. 13, 262. 2 Bl. Rep. 794, 840, 1106, 1217. Cowp. 525. Doug. 155. 1 Burr. 436.

Smith, J. now delivered the opinion of Mr. Justice Shippen and himself, in which the whole Court concurred. No doubt could possibly arise in this case, were it to be judged of by the bankrupt laws of England. Many decisions have settled the point, that as to debts arising after bankruptcy, though on a pre-existing ground, creditors cannot come in under the commission, nor are barred by the bankrupt's certificate. 3 Wils. 13, 262. 2 Bl. Rep. 794. Cowp. 527. 1 Term Rep. 599. But

it is insisted by the defendant's counsel, that the words of the Maryland act being *all debts owing or contracted*, are more extensive than those of the English bankrupt act, and therefore the construction should be different. Yet we are not without precedent, under the stat. (12 Geo. 3, c. 23) of insolvency, which in sec. 27 extends to all debts *contracted, incurred, occasioned, owing, or growing due*, and are much larger than the words of the Maryland act. Under this statute it has been adjudged that where a sheriff's officer has been discharged, and an action was afterwards commenced against the sheriff for his misconduct prior to the discharge, which the officer's security stops by paying the money, such security may hold the insolvent to special bail, for such subsequent damnification. This case is expressly in point. See also Cowp. 23. We are therefore of opinion that the plaintiff is entitled to recover, and that judgment be entered accordingly.

JEREMIAH WARDEE, JEREMIAH PARKER and RICHARD PARKER,
vs. WILLIAM BELL, CHRISTIAN FEBIGER, JAMES READ, and
ROBERT M'CLAY, executors of JOSEPH CARSON.

Whether reasonable notice of a bill being dishonored has been given by an indorsee to an indorser, has been usually left to the jury, and the strictness of notice in England has not been adopted.

A RULE had been granted to show cause why a new trial should not be granted in this suit.

The action was tried in bank, at the last September term, before Shippen and Smith, justices, and a verdict passed for the plaintiffs. It was brought against the defendants on an indorsement of a foreign bill of exchange by their testator.

The bill was dated 10th September, 1788, and drawn by Hugh Moore on John Balfour, in Londonderry, for 120*l.* sterling, payable to the order of Joseph Carson, in London, in sixty days after sight, and by him indorsed to the plaintiffs. The bill was accepted on the 22d November, 1788, and protested for non-payment on the 24th January, 1789. The only proof on the trial, of notice of the protest to Carson, was the deposition of Daniel Williams, junior, which was agreed to be read in evidence. He swore that he lived with the plaintiffs in 1789, and the two succeeding years, and went frequently to Carson's for money due on this protested bill, and about the same time he delivered a note to Hugh Moore, but he could not fix on any particular period.

The argument on the rule to show cause took place at the last term.

Mr. Ingersol, for the defendants, urged that before an indorsee could recover on a protested bill of exchange, against an indorser, he must give early notice to him of the bill being dishonored. If there is any unreasonable delay, the indorser is discharged. There is no reason why the same scrupulous exactness should not be kept up here as in England, where the parties live in the same city. In that kingdom, to preserve certainty and an uniformity of decision, notice is matter of law. To say there is no fixed rule amongst us in such cases, is putting mercantile concerns, to the greatest amount, in a most perilous situation. But though the precise time in which notice to an indorser must be given, is not ascertained here, yet it has been clearly settled that early and convenient notice is indispensably necessary; and so is the case of *Steinmetz vs. Currie*. Dall. 234, 270. In the present instance the evidence of notice is altogether defective.

Mr. Rawle, *e contra*, for the plaintiffs. The Court, in their charge, left the point open to the jury to determine whether there had been reasonable notice; and at the same time told them it was necessary that the notice should be early and convenient. It would be highly improper to adopt the strict rules in England, as to notice; our trade differs every day, as much as our climate. But should it be deemed eligible to fix a new rule of decision as to what shall be deemed early and convenient notice of a protest, it is submitted that the plaintiffs should not be made the sacrifice to this doctrine. As to them, it would be an *ex post facto* law. The Court instructed the jury expressly that notice of the protest should not be presumed. Here there was direct proof of notice, though not of the time of giving it.

The chief justice now delivered the opinion of the Court. The ground on which a new trial is moved for is, that notice was not proved to Carson, the indorser, in due time, of the bill being dishonored; and that, therefore, he and his executors after his death, are discharged from all responsibility on account of non-payment. The rule certainly is that reasonable notice must be given in convenient time and at an early day. What is reasonable notice has been lately settled in England to be a question of law, when the facts are established, and the time of giving notice extremely narrowed (1 Term Rep. 168, 169, 170). Our trade and usages are not so well fixed as to admit these strict rules, and for the reasons given in *Robertson, et al., vs. Vogle* (Dall. 255, 256), such strictness would, in its consequences, be dangerous and inconvenient. No decision that we know of amongst

us, has any fixed general rule; and the question respecting the reasonableness of notice has usually been left to the jury as a matter of fact, with this provision, that they should be satisfied in their consciences that there was convenient notice. Indeed, in suits brought by the banks against indorsers of promissory notes, we have gone so far as to say, that as they themselves have adopted the practise of giving notice to indorsers within six or seven days at furthest, where the parties live in the city, this usage shall be obligatory on them, and that a further delay will discharge the indorser. But we have gone no further. The Court in their charge in this case have conformed themselves to the usual practise, and informed the jury they should not presume a notice. The point was wholly submitted to their decision, and they had a right to infer from the known habits and regularity of the plaintiffs in the transaction of their business, that the notice which Williams gave by their order was made in due time, though he does not now recollect it. We cannot therefore now interfere in a matter which was left open to the jury for their decision, and consequently the rule to show cause must be discharged.

Judgment, *pro quer.*

[Vid. 4 Term Rep. 468. Where a verdict had been found for the plaintiff, on a presumption contrary to evidence, Court refused a new trial, the plaintiff being entitled to recover in conscience and equity.]

PETER MESSIER, surviving partner, *vs.* BENJAMIN AMERY.

The counsel who moves for a new trial should begin and conclude the argument. If a factor takes a note in his own name, for a debt due to his principal, the note belongs to the principal in case of the factor's bankruptcy. The sentence of a foreign Court having jurisdiction of the subject matter, is conclusive. And where one has received money under such a sentence, on a foreign attachment, however erroneous it may be, it cannot be recovered back as money received to the true owner's use.

THIS cause was tried at the sittings in Philadelphia, on the 29th March, 1794, when a verdict was given for the plaintiff for 404*l.* 6*s.* 7*d.*, principal, and 566*l.* 1*s.* 4*d.*, interest, with six pence costs, reserving a liberty to move for a new trial. A rule to show cause was accordingly entered at the following term, which came on to be argued, in April term last, by Mr. Lewis, for the plaintiff, and by Messrs. Ingersol and Wilcocks, for the defendant.

Previous to the argument, a question of order arose, *which* of the counsel should begin and conclude.

The Court ruled that the counsel who moved for the new trial should begin. It is proper that his reasons and the grounds of his motion should be first heard, and this practise tends to expediate business. The same thing was done in *Campbell's lessee vs. Snodgrass*, *M'Causland's lessee vs. M'Causland*, and in many other cases, where arguments respecting the granting of new trials have been had. The greater part of such arguments in *Burrow's Reports*, are conducted on the same system.

The facts which appeared on the trial were as follow :

Ram Rapalje and Jacob Vonhoreis, together with the plaintiff, were owners of the brig *Jenny*, whereof Reuben Fairchild was captain, and had general powers to act for the best interests of his employers. Rapalje and Vonhoreis died since the commencement of the suit, and Messier survived. In May, 1776, Fairchild, who was a poor man, sailed from New York, on a trading voyage to Ferrol, Gibraltar, St. Christopher's, and St. Eustatia, trafficking at those different ports as the agent and supercargo of the plaintiff and company. He carried out a cargo of flour, &c., belonging to them, and had only a small adventure of his own on board. The register of the brig was in the names of the company, and the bills of lading were expressed to be on their own account. In July, 1775, he remitted money from Ferrol to his owners.

With the proceeds of the flour which the captain sold at Gibraltar, he purchased and took in 80 mules on their account, and afterwards sold them and the brig to Sir Patrick Blake, Abraham Vanbebbber, and others, and took thir notes in his own name. Fairchild kept his books and accounts in the names of his owners.

On the 11th January, 1777, captain Fairchild being about to sail from St. Eustatia to Edenton, in North Carolina, gave a power of attorney to one William Smith, who resided in St. Eustatia, and delivered to him several notes, the greater part of which were traced on the trial to have been for outstanding moneys belonging to Messier & Co., though drawn payable to himself, to be delivered over to his owners in case of his death. He endorsed the papers in which these notes were enclosed, in his own hand writing, that they were the property of Messier and Co.; and on his arrival at Edenton, wrote to them that he had deposited these notes in Smith's hands, as their property, to avoid the dangers of the voyage. Fairchild here received two hogsheads of rum, which had been consigned to him by the de-

fendant, and which he sold for continental money, and died in North Carolina, in the summer of 1777.

On the 17th May, 1779, Amery, the now defendant, instituted a foreign attachment in the island of St. Eustatia, against Fairchild, and levied it on the property in the hands of Smith, but the suit was afterwards discontinued. On the 24th September following, he issued a new foreign attachment against him for 3614*l.* 15*s.* 11*d.* North Carolina currency, which was also levied on the property in the hands of Smith, and after a hearing of Smith, the governor and council of the island gave their decree on the 9th February, 1780, wherein they confirmed the attachment, and gave judgment for Amery, for 3424*l.* 13*s.* 11*d.* North Carolina currency, or, in default thereof, one silver dollar for eight, amounting to 1471 dollars, 4 stivers, and 2 sous, with 11 dollars costs. Hereupon, on the 13th April, 1780, Smith paid the debt and costs to the marshal of the Court, and obtained his receipt for the same, in silver dollars, at 8*s.* per dollar, and afterwards paid to the plaintiffs and company the balance of the money, the produce of the notes, agreeably to the account exhibited by him to the Court of St. Eustatia. The now plaintiffs, afterwards discovering property of the defendant in Philadelphia, issued a foreign attachment against him, on which special bail was entered, and the cause came on to be tried before Mr. President Shippen, in the Common Pleas of Philadelphia county, when the jury gave a verdict for the plaintiffs. A new trial was afterwards awarded by the Court on a point reserved.

On the trial at *Nisi Prius*, there was no argument respecting testimony, it being agreed that all the facts should be disclosed for the opinion of the Court.

The defendant's counsel made two points: 1. That the proceeding in St. Eustatia, being in a foreign Court, of competent jurisdiction, cannot now be overhauled. 2. That the money paid by Smith to the marshal, for the defendant's use, cannot be followed.

This Court cannot now examine the question, whether the notes belonged to Fairchild, or his owners, nor if it appears ever so clearly that they were not Fairchild's property, can they annul the decree of a foreign Court. The defendant does not ask the assistance of this Court to aid the decision of a sovereign, independent authority. But the intermeddling with the sentence of a foreign Court is deemed an attack on the sovereign. Vattel. Lib. 2, c. 7, §§ 84, 85. Until a judgment is set aside or reversed, it is *conclusive* as to the subject matter of it, to *all intents and purposes*. 2 Burr. 1009. We must note that the decision there

was consistent with that of the Court of conscience. If the now plaintiff can go into an examination and revision of the decree, the defendant may do the same thing as to the judgment of this Court, and he, too, may attach the goods of the plaintiff when he finds them in a foreign country, and so the *race* for *jurisdiction* may go on *ad infinitum*. As to the objection that Fairchild was dead when the attachment was sued against him, this Court will not presume the fact to be so; they will, at least, suppose that the suit was conducted in conformity to the *lex loci*.

Foreign judgments are examinable, but are grounds of action everywhere. Doug. 6 (note 4). But it must be considered that all judgments out of Westminster Hall are deemed foreign, and the instances there put are of judgments given in Courts within the king's dominions. The case does not allude to the judgments of the Courts of an independent nation. B. R. will give credit to the proceedings of the Courts of other kingdoms; it will not examine them, but presume their judgments to be right,—Carth. 32, 2 Show, 232; T. Raym. 473,—even though the sentence be unjust. 2 Ld. Raym. 936. Where the question is prize, or no prize, no prohibition goes to the admiralty. 1 Sid. 320. If the decree of the admiralty be definitive, B. R. will not interfere. Ib. 418. By the law of nations, the justice of one nation shall be aiding to the justice of another nation, in executing the other's judgments. Rol. Ab. 530, pl. 12. One having seized and condemned goods in another kindom, according to their law, was prosecuted by several actions after he came to England, at the suit of the former owners of the goods, but a perpetual injunction was granted. Finch. Rep. 136. Where a final decision in a foreign Court has taken place, it is conclusive on all parties. 1 Vern. 21. No equity can arise on a transaction finished in another Court. 1 Bro. Cha. Rep. 376. Where the ground of a sentence of a Court of Admiralty is manifest, and it appears to have proceeded on the point in issue between the parties, or where the sentence is *general*, and no special ground is stated, there it shall be conclusive and binding; and the Courts in England will not take upon themselves, in a collateral way, to review the proceedings of a *forum* having competent jurisdiction of the subject matter. Parke on Insur. 403, 407, 410, 412, 417.

From the decree in the suit at St. Eustatia, it must necessarily be presumed that there were effects of Fairchild in the hands of Smith. He was certainly entitled to commissions for his superintendence; but was the fact otherwise, it is now too late to question it. Ld. Loughborough says, that though another country should determine against his opinion, he should not think

himself at liberty to examine it. H. Bla. 693. It has been remarked of Lord Chief Justice Lee, that he used to call for adjudged cases or precedents, where counsel descanted on general principles. It is presumed by the defendant that no resolution can be prodned to warrant this Court in correcting any supposed errors of the governor and council of St. Eustatia, in their decree on this attachment.

As to the second point. Either Smith was fully heard before the governor and council, or he was not. If he has received a patient hearing and made his defense, his principal is now precluded. But if otherwise, the payment must be considered as voluntary, and cannot be questioned. Had Smith stolen the money, and paid it away on a good consideration, it could not be followed on account of its currency. 1 Burr. 457. 1 Bl. Rep. 485. So a factor placed here by a foreign house, and paying his private debts with the produce of his constituent's effects, the moneys so paid cannot be recovered back. A precedent debt is as valuable a consideration as money paid, or any other matter. A trader involved in his circumstances, may give a bond, note, or bill of exchange to a creditor on being pressed for payment; and the same would be equally good as if cash or merchandize were delivered.

The decree in St. Eustatia is at least *prima facie* evidence that the defendant received the money in consequence of a previous debt. In most cases it would be deemed conclusive. A third person cannot question the payment of money under the judgment of a Court on a foreign attachment, unless in a few excepted cases, under the spirit of the British bankrupt acts.

In Cowp. 200, the distinction is established that if money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they came *mala fide* into a person's hands, they are in the nature of specific property, and if their identity can be traced and ascertained the party has a right to recover. Consequently, it must be granted on all hands, that the plaintiff must identically distinguish the money and notes in the hands of Smith; and that even if the specific pieces of eight, or other coin, which had been received by Smith on the notes lodged with him, had been proved to have been paid by him to the defendant's use on the judgment, the present suit is not maintainable.

For the plaintiff it was insisted, that most of the authorities which had been cited were prize causes, to which all the world are or may be parties. There the prosecutions are *in rem*, but a foreign attachment cannot properly be so called. No moni-

tions issued in such a cause. The case cited from Douglass, is confined to the effect of a judgment between the parties themselves.

Foreign judgments are not of more extensive efficacy than the judgments of our own Courts, where they respect the interests of strangers. Unless the decree of St. Eustatia is a conclusive bar to the present action, the suit is maintainable. It was proved that Smith received the plaintiff's money, and not Fairchild's. He was the attorney in fact of the latter, but not of the former.

Suppose the brig Jenny had been attached in that island, the company would not have been concluded thereby. Or if a replevin had issued for her, and the property had been found in the party suing, though Fairchild had claimed her in his own name, the owner's title would not be divested. It is fully settled, that a verdict can only be given in evidence against the parties themselves, or those claiming under them. So of recitals in a deed, and of depositions taken under an order in chancery. Wherever a stranger is prejudiced by a judgment, and cannot bring error, he may show the error in evidence, on a proper plea. 2 Mod. 308. Cro. El. 199. 2 Bac. Ab. 189. 11 Co. 44, b. Godb. 377. 3 Danv. 2, pl. 10, 11, 12. If the defendant had pleaded this decree in bar to the suit, Messier & Co. might have replied that it was not binding on them, as strangers thereto; and moreover, that it was absolutely null and void, the foreign attachment having been commenced two years *after the death of Fairchild*. The plaintiff and co. could not have brought error, or appealed from that decree, and are without remedy unless in the present mode of suit. The defendant has given the foreign decree in evidence, and has not pleaded it. It was competent therefore to the plaintiff, to show in evidence, that it is fundamentally bad. There must necessarily be a plaintiff and defendant in adverse suit. Fairchild being dead, it was a mere mockery of justice. A foreign attachment cannot charge any person but a debtor. 1 Ld. Ray. 56.

It has been said that however unjust the sentence was, the money shall not now be recovered back. But if A recovers a horse against B without a title, the true owner may surely institute a suit against him. If the plaintiff recovers in this action, the evils apprehended, arising from a race of Courts for jurisdiction, cannot ensue. For Messier, as surviving partner of the company, and Amery, being parties hereto, must necessarily be concluded by the event. If the plaintiff succeeds, the defendant will not be injured. He has the same remedy as formerly against Fairchild's estate,

Identifying money, in the case quoted from Cowp. 200, does not mean the same numerical pieces of coin, but the same real debt or sum. It is sufficient that the plaintiff has shown in evidence, that certain specific sums, arising on notes clearly ascertained to be the property of his late house, were paid into Smith's hands, and improperly levied on under the foreign attachment. The reason why money cannot be followed, is on account of its currency. It is quaintly said to have no *ear-mark*. 1 Burr. 457. If a *marked* guinea is dropped in the street by accident, and paid away by the finder for a valuable consideration, the former owner cannot recover it, though it has an ear-mark. But before the money is paid away, an action would lie against the finder. The payment by Smith to the defendant's use was not in a course of dealing, but under this void decree. Where money is paid, by mistake, to an agent, and by him placed to the account of his principal, but *not paid over*, it may be recovered from the agent by the person who paid it by mistake. But if there has been a new credit, an acceptance of new bills, fresh goods bought, or money advanced by such agent, the case would be otherwise. Cowp. 565, 569. The reason is obvious, the situation of the agent would be changed. Now here, there is no *bona fide* valuable consideration, to vest money in the defendant.

A bank bill lost, trover will lie against the finder, but not against a stranger, who gets it from him for a valuable consideration. 1 Salk. 126, pl. 5. And in such case, the stranger must not only show that he came by it *bona fide*, but also for a valuable consideration. 1 Bl. Rep. 485. If the finder had made a gift of the bank bill thus lost, it should not prevail against the true owner.

These moneys have been traced through all their different changes into Smith's hands. By the payment of the notes of Blake, Vanbebber, and others to him, the plaintiff's debtors were only changed. Smith thereby became a sub-agent, indebted to the late house of Messier & Co. It is of no moment in whose name the factor transacts his business.

In the case of M'Carty, surviving partner of Cummins, against Nixon, administrator of Cummins, where Cummins had come from France to Virginia, to collect the debts of the company, for many of which he took notes merely in his own name, which were afterwards negotiated in the bank of North America, it was adjudged that the money of the notes should go over to the surviving partner, for the purpose of paying the partnership debts, and not to the administrator of Cummins, who was his private creditor. There the shipment was proved to have been

made for the company, and the notes taken, and the money paid in pursuance thereof; and it was ruled, that the plaintiff had identified his debt, though not the numerical pieces of coin. So in the case of a factor, in the event of his bankruptcy.

[*Per Curiam.* If a factor takes a note in his own name for a debt due to his principal, the note clearly belongs to the principal, in case such factor afterwards becomes bankrupt.]

The mail was robbed of a bank note, and an innkeeper came to the possession of it for a fair and valuable consideration, he shall hold it. 1 Burr. 452.

The situation of the plaintiff and defendant is not equal in point of equity. Fairchild was the mere factor or agent of the plaintiff's house. According to the case put by the other side, a factor settled in a store, with goods and money, by a foreign company dealing for them only and not for himself, would be considered as more than a creditor of such company. The goods and money would be deemed the property of the constituents. The factor's private debts could not be paid out of the funds of his employers. The money in Smith's hands as much belonged to the late house of Messier & Co., as the brig, flour, mules, &c., from the sales whereof it was produced. Their own ascertained property is merely claimed. The defendant claims to be paid his private debt due by Fairchild, out of it, alleging it to be the property of the latter, whereas the fact has clearly been proved to be otherwise. The defendant, if he repays the money which he has injuriously received, is only in *statu quo*.

Precedents of such suits as the present, have been called for. The plaintiff is not without them.

One received the note of a garnishee for 1200*l.* in satisfaction of a judgment obtained in the Mayor's Court of London on a foreign attachment, and was afterwards, on special circumstances, ordered to deliver up the note to be cancelled. H. Bla. 181 (note a). In the case of British subjects and a bankruptcy, and one of the creditors sued an attachment against the bankrupt's effects in the West Indies, and received his debt, an action lay by the assignees to recover back the money against the plaintiff in the attachment. H. Bla. 665. No objection was made, that such suit was not maintainable. And in Hunter, *et al. vs. Potts* (4 Term Rep. 182), several cases of the same kind are stated. In none of them were the numerical moneys identified, nor can they be distinguished from the circumstances of the present suit.

The plaintiff rests his case on another complete ground. Even if the goods and notes were Fairchild's property, there was a complete appropriation of them to the use of Messier and company. The cause of Vance, Caldwell, and Vance, meets this point fully. There, this Court left the intention of the owner of the effects to the jury, in derogation of the rights of the creditors, under a foreign attachment, and the jury found an appropriation accordingly. These notes were left in Smith's custody, to go over to the partners in case of Fairchild's death. When he died, in North Carolina, the appropriation finally took place, and the notes vested fully in them, until they expressed their dissent.

Moreover, the verdict is consistent with the principles of substantial justice, and therefore a new trial will not be granted. 2 Salk. 644, 647, pl. 16; 648, pl. 18, 653, pl. 34, 35; 1 Burr. 397.

This term the judges proceeded to give their opinions.

M'Kean, O. J., fully stated the circumstances of the case, and then observed, the defendant avails himself of the decree of a foreign Court on a full hearing and defense made. The moneys in Smith's hands were thereby adjudged to be Fairchild's property, at least to the extent of the now defendant's claim on him. The great question is, whether we can re-examine this foreign judgment in the present suit? If we can do it, Amery, in another country, may bring our decision again into question, and the litigation may thus never be at rest.

We have no right, by law, to assume the power of annulling the sentence of the Court of an independent kingdom. We are bound to pay every respect to the decrees of such Courts for the common safety and happiness of mankind. We are unacquainted with the laws and customs of the island of St. Eustatia; but there most probably must have been some tribunal to which Messier and company, or Smith, in their behalf, might have appealed. In that forum, advantage ought to have been taken of Fairchild's death, and the point re-examined, whether the notes belonged to the owners or captain of the brig Jenny. But as to us, the decree given and unreversed is conclusive, and we have no power over it. We cannot possibly say that in this instance the defendant has received the money under the judgment to the plaintiff's use, and therefore I am of opinion that a new trial should be granted.

Shippen, J. Having delivered my sentiments at large in this

action from another bench, I mean now only to take notice of two new cases, cited at the last argument by the plaintiff's counsel, to show that actions for money had and received had been brought and supported against plaintiffs who had recovered upon foreign attachments, to oblige them to refund to third persons the money so recovered. These are the cases of *Hunter vs. Potts*, in 4 Term Rep. 182, and *Sill et al. vs. Warwick*, in H. Bla. Rep. 665. In both cases the ruling principles appear to be that all the parties were subject to the bankrupt laws of England, where every man is supposed to be consenting to every act of parliament; that there was an actual vesting of the property of the bankrupt in the assignees, for the benefit as well of the plaintiffs in the attachments, as of all the other creditors; that the plaintiffs being jointly interested with the other creditors, and having a full knowledge of the whole transactions, took indirect measures to apply the whole property to their own use, in direct violation of the bankrupt laws, and his virtual contract with his fellow-citizens. It was therefore consistent with every principle of law and justice, to make those plaintiffs answerable to the assignees of the bankrupt, for the money they had so unfairly recovered by attachments in America, and which the assignees were entitled to as trustees, as well for the plaintiffs in the attachments themselves, as all the other creditors.

Lord Loughborough, in delivering the opinion of the Court, in the latter case, is very careful to distinguish that case from the general case of a creditor, unconnected with the bankrupt laws, who recovers his debt in a competent Court of justice in a foreign country. For although he is of opinion that the operation of the proceedings, under the bankrupt laws of England, is such as to vest the personal property of the bankrupt, *in every part of the world*, in the assignees, from the time of the assignment, yet he expressly declares that a creditor in a foreign country, not subject to the bankrupt laws of England, nor affected by them, obtaining payment of his debts by the judgment of a foreign Court, and coming afterwards to England, *could not be made liable to refund that debt*. He goes further, and says that if the claim of the assignees of bankruptcy had been communicated to the Court who decided the case abroad, and they had preferred the claim of the suing creditor to theirs, although he should think that determination wrong, yet it could not be revoked by another Court of justice in England.

This principle fully reaches the case before us. Amery, a creditor of Fairchild, attaches his effects in a foreign country, in the hands of Smith, the agent of Fairchild. Smith appears and makes defense, and no doubt communicated to the Court the

circumstances, which lay the foundation of the present plaintiff's claim. The Court adjudge that the money in the hands of Smith was the property of Fairchild, and compel him by their judgment to pay Amery his debt out of it.

Now if we should even be of opinion that the money in the hands of Smith was the property of Messier & Co. and not of Fairchild, yet upon the principle of the case determined by Lord Loughborough, we have no power to revoke that judgment. The whole matter was before that Court, and they determined the property to be Fairchild's. The plaintiff in the attachment was wholly unconnected with the present plaintiff, and cannot upon any ground I know, be considered as receiving the money to his use. The more obvious recourse of the plaintiffs is to Fairchild's estate, if he has left any; if not, it is more agreeable to law and justice that the plaintiff should suffer by the default or failure of his own agent, than that a stranger recovering a fair debt in a regular course of justice, should refund the money to another stranger, with whom he had no manner of connection.

Yeates, J. However hard the circumstances of this case may seem to bear on the present plaintiff, yet I am constrained to think, as well on general principles as the particular authorities cited, that he is not entitled to succeed in this suit.

The defendant has recovered his debt against Fairchild, by due process of law in the Court of a foreign country, having competent jurisdiction. That decree remains in full force and unreversed to this day. Whatever errors or irregularities may be pointed out in the decision of that tribunal, this Court is not competent to re-examine, revise or revoke it. The sentence of the foreign Court is conclusive and binding on us, as it had competent jurisdiction of the subject matter. Parke on Insur. 403, 417. A contrary doctrine would be attended with the most pernicious consequence to society.

The objection, also, taken from Cowp. 200, that the money having been paid to the defendant, a stranger to the plaintiff, *bona fide*, and on a valuable consideration, cannot now be brought back by the true owner, seems to me to be an additional insuperable bar to the plaintiff's recovery. We are not warranted in saying, that the money paid has been received to the use of the plaintiff; and, on the whole, I think that a new trial should be granted.

Smith, J. stated the case minutely; and observed that the question was, whether the present action can be maintained? Or, in other words, whether money recovered by the judgment of a Court having competent jurisdiction, can be recovered back in another Court by an original suit?

A variety of cases has been adduced by the defendant's counsel, showing that the merits of a judgment can never be overhauled by a different Court in a new original suit; that the peremptory sentence of a foreign Court is conclusive on all parties, and other Courts will pay due respect to such decisions; that the intermeddling with such decisions is an attack on the sovereign; and that this doctrine is very particularly ascertained, as to cases determined in foreign Courts of Admiralty.

It has been objected that most of these are prize causes, to which all the world are, or might have been, parties, being prosecutions *in rem*. But it is not in the power of a plaintiff in a foreign attachment to make it *in personam*, or other than as a prosecution *in rem*. He carries it on as such; and so it is considered in Dall. 264. 4 Term Rep. 191. This takes away the force of the objection arising from the death of Fairchild. Nor is this regard to foreign judgments confined to sentences in prize causes, or in Courts of Admiralty. Vid. Stra. 738. 2 Eq. Ca. Abr. 524.

Did the party in whose favor the foreign judgment was given, apply to the Court to give effect to it, it would be only *prima facie* evidence, and we could examine into the grounds of it; but as he makes no such application, that judgment is binding on us, and therefore we cannot take notice of the death of Fairchild. Smith had an opportunity of pleading it, and it is to be presumed, would have done so, had he supposed, or been advised that it would have availed him. He contended that he had no effects of Fairchild's in his hands, but it was adjudged by a competent Court that he had.

H. Black. 665, and 4 Term Rep. 182, have been cited by the plaintiff to show that money of a bankrupt, though recovered in a foreign attachment, has been recovered back in England by his assignees. But these cases do not apply to that before us. They arose on the bankrupt laws, and between British subjects residing in England, none of whom can gain a preference over bankrupt's estates.

The ground of the decision in H. Black. was, that the plaintiff in the attachment, residing in England, had, contrary to the laws of England, founded that attachment on an act done there by him, viz: an affidavit before the mayor of Lancaster. H. Black. 689, 694. And it is said, that a foreigner coming into England, after recovering such money on an attachment, could not be there sued. Ib. 698.

The foundation of the judgment in 4 Term Rep. was that the party residing in England, knowing of the commission and assignment, transmitted an affidavit on which the attachment was

founded, to Rhode Island, to gain a priority. Therefore, *as personal property* is governed by the law which governs the *person* of the owner (H. Bla. 691, Vattel lib. 2, c. 7, § 85 ; c. 8, §§ 109, 110, 4 Term Rep. 184), these attachments, instituted contrary to that law, were of no effect. But in the present instance, the now defendant was not restrained by any law from bringing the attachment. He did not bring it to attach the effects of Messier and Co., but of Fairchild. A competent Court has determined that the property attached was Fairchild's, and we have no power to unravel, or overhaul its proceedings. Amery recovered the money *bona fide* for a just debt, and the now plaintiff cannot bring it back from him. Cowp. 200.

Admitting that the plaintiff has equal equity with the defendant, and that the decree of the foreign tribunal was out of the question, where there is equal equity, possession fairly obtained must prevail. Doug. 617.

The owners appointed Fairchild *master* of their vessel, and their agent. They are, therefore, to be affected by his misconduct, and that of his substitute, and not Amery, between whom and either of them, it is not alleged that there was any collusion.

There can scarcely be cited a stronger case, to prove that the decisions of foreign tribunals are conclusive, than those of Solomon *vs.* Ross, H. Bl. 131 (note a), and Jollet, *et al.* *vs.* Deponthieu, *et al.*; and Neale, *et al.* *vs.* Cottingham, *et al.* Ib. 132 (note), upon duly attending to all the circumstances stated.

Several cases have been cited by the plaintiff's counsel (to which many more may be added, 2 Bl. Rep. 1221. 2 Wils. 307. 2 Burr. 665. 3 Salk. 361. 3 Bac. 26. 2 Bl. Rep. 1177. 2 Burr. 936. 1 Bl. Rep. 195. Lofft. 521. 4 Term. Rep. 468) to prove that where a verdict is *substantially right*, a new trial ought not to be granted. The law certainly is, and ought to be, so. But these cases do not apply to the motion before the Court, because the verdict was entered with liberty to move for a new trial, and it was the understanding of both parties that the point of law was to be argued before the Court on this motion.

New trial awarded.

A new trial was afterwards had on the 22d March, 1796, and a special verdict found, at the instance of the plaintiff's counsel. The Court in the same term gave judgment for the defendant, without argument. [See this case in 2 Dallas, 281, by name of Rapelji *vs.* Amery.]

ARMAND CAIGNETT vs. GUILBAUD ROUGE and COMPAGNE.

A Frenchman, who has never assented to the French republic, established on the 21st September, 1792, and leaving the French West Indies, and settling in the United States, buying lands therein, &c., is not within the 12th article of the consular convention between France and America.

THE plaintiff instituted a foreign attachment against the defendants to January term, 1794, and obtained judgment in September term following. A *scire facias* was brought against Andrew Petit and Andrew Bayard, the garnishees, to January term last. And a motion was now made to dismiss the original snit, under the 12th article of the consular convention, agreed upon between the United States of America and France, at Versailles, on the 14th November, 1788. (2 Cong. Laws 357.)

The motion was founded on the deposition of John Carteaux, who swore that the plaintiff and defendants were French citizens; that the parents of the former were planters in that part of the island of St. Domingo which was possessed by the French; that the plaintiff and his sister were entitled to a large real estate there; and that in 1791 and 1792, he acted in the character of a suppleant in that island.

On the part of the plaintiff, several counter affidavits were produced, showing that he came into the United States on the 6th May, 1792; that the witnesses knew him several years before the establishment of the French republic, on the 21st September, 1792, and since; that the plaintiff had uniformly dissented from the said republic, and had frequently expressed his unequivocal sentiments to that effect; that he had bought lands near Frankford, in the county of Philadelphia, and had settled thereon with his family; that during the course of the last year he had gone to Leogane, and the French commandant had declined making him do duty there, considering him as a citizen of the United States; and that application had been made in April, 1795, to M. Petrie, the French consul, to take jurisdiction of this cause, which he had refused, the plaintiff having taken the oath of allegiance to Pennsylvania. A certificate of Hilary Baker, esq., one of the aldermen of the city of Philadelphia, was also produced, showing that the plaintiff had taken such oath before him, on the 5th September, 1793.

The counsel for the plaintiff made two points. 1. If both plaintiff and defendants are French citizens, the French consul has no jurisdiction over foreign attachments. 2. That here the plaintiff is no French citizen, nor ever was a citizen of that republic.

On the first point, the words of the 12th article are, "all

differences and suits between the subjects of the most Christian king in the United States, or between the citizens of the United States *within* the dominions of the most Christian king," &c. Now in the former part of the clause, "subjects" are the last antecedent. The plaintiff and defendant must be within the United States, to give jurisdiction to the consul. Here the defendants were not within the United States when the suit originated, and the power of the consul could not reach beyond his district. How could the consul begin the action, or how give judgment, when the defendants lived in the French West Indies? How could he proceed against American citizens' garnishees, or how try their plea of *nulla bona*? Could he convene a jury before him? What process would he use?

But suppose these difficulties got over, how could he enforce his sentence. Consuance of pleas is never to be allowed, unless the judgment can be enforced. 2 Vent. 362, 363. A consul cannot claim privilege in his own case. 3 Bl. Com. 298. To carry into full effect the provisions of this convention, congress have passed an act on the 14th April, 1792, respecting wreck, &c. 2 Cong. Laws, 70.

The duty of a prince is to see justice done to his subjects by proper judges. Vattel, lib. 1, c. 13, §§ 161, 163, 167. But by the construction contended for, the only tribunals by which full justice could be done to the citizens of France are taken away, and no effectual substitute provided.

The title of the convention shows that it was merely designed to define the consular jurisdiction. In the case of *Langlois vs. Truil*, determined by Mr. President Biddle, in Philadelphia, it was held that the United States Courts might proceed in all such cases, unless suit had been brought before the consul, or unless he would claim jurisdiction. His expressions were "If the French consul will certify that the parties are French citizens, and that he will act as a judge between them, we will not assume the jurisdiction. But it never could have been the object of the convention to prevent justice being done."

[On the second day of the argument, the claim of M. Le Tombe, consul-general of France, was filed, empowering M. Du Ponceau to claim of the Court the execution of the consular convention.]

As to the second point, it is essential to all good government that the majority shall rule. A minority who voluntarily continue within the society, must submit to the voice of the larger body. A civil war breaks the bonds of society and government, and produces two independent parties, who acknowledge no superior, and every man may choose his own side. Vatt. lib. 3,

c. 8, §§ 298, 295. The minority have, individually, an unrestrainable right to remove, with their property, into another country, and a reasonable time for that purpose ought to be allowed. None are *subjects* of the adopted government who have not freely assented to it. Dallas, 58. The Pennsylvania act of assembly, of 13th March, 1789 (2 Dall. St. Laws, 677), does away all tests, except in the cases of officers and foreigners. It is not insisted that the plaintiff taking the oath of allegiance before alderman Baker, makes him an American citizen. But it indubitably shows, *quo animo*, he came into the United States. His purchasing of lands here, his settlement with his family thereon, and his unequivocal declaration of his political opinions, prove his pointed determination, not "*to be distinguished by the honorable appellation of a French citizen,*" according to the language of the advertisement of the French consul, dated 12th February, 1794, "calling on the French republicans in America to repair to the consulate, to produce their passports, to enter their names, and to certify the births in their families," &c.

Every man has a right to migrate to another country when he does not thereby expose the safety of his own country. Vattel, lib. 1, c. 13, § 220. A man ceases to be a citizen by removing with his family and property to another country. Heineccien's Univ. Law, 220, § 230.

The fourth article of the American confederation shows that the word "citizen" may mean an *inhabitant*, without being entitled to all the privileges of a subject. The same thing appears by Vattel, lib. 1, c. 13, § 213.

So Johnson's dictionary voc. citizen, shows that it is used in the double sense of a "freeman" and "inhabitant." It is therefore presumed that the word "citizen," in the 12th article of the consular convention (which was agreed to about one year after our confederation) was merely intended in the sense of "inhabitants."

It has been confidently said that in a state of society, a man must necessarily be the *citizen* of some country. But in the extensive sense of the term, this position certainly cannot hold. It is clear that a man may expatriate himself; and if he remove to another state or kingdom with an intention of living therein and becoming a citizen, and the laws of the country to which he removes require residence for a *certain period* there, as an indispensable ingredient in the formation of citizenship, he cannot be considered as a *free citizen* of either state or kingdom.

E contra, for the defendants, it was insisted that the whole structure of the 12th article in question meant to include dif-

ferences and suits in the United States, between the subjects of France. The great object was, that the citizens of either empire should not be drawn before a foreign tribunal; and it was the wish of both nations to preserve their judicial authority over their own people. The words of the article are general, and very comprehensive; and if a citizen of the United States thinks proper to acknowledge the consular jurisdiction, by entering into a stipulation before a proper officer, he must abide the consequences. Forms of process would not be wanting in such a case. National faith must be preserved.

Foreign attachments are *in rem*, and when special bail is put in, they are dissolved. The suit then would be between French citizens in the United States. The same objection as to the consul's cognizance failing, because he cannot enforce his decree, would equally apply to controversies between two or more states, under the second section of the third article of the present constitution of the United States, since no method is thereby pointed out of enforcing the sentences of the judiciary in such cases.

No argument can be founded on the application to the French consul in April, 1795. Judgment had then been entered in the attachment, a *scire facias* was depending against the garnishee, *sub judice lis fuit*. It would have been indecent in the consul to interpose at that period, even admitting that his jurisdiction was clearly ascertained. It was more proper for him to rely on the justice of this Court, confiding in a faithful fulfilment of the treaty. On being pressed, however, the consul has now filed his claim.

But it must be conceded, that the privilege of exemption from suits in the United States' Courts belongs to French citizens, as individuals; and any one may claim it, without the interference of the consul. A strong inconsistency is obvious in the plaintiff's conduct. He asked a decision of the French consul five months ago; he now disclaims his jurisdiction, and contends that he is no French citizen.

2d. There is nothing to show that the plaintiff is not a French citizen. It is clear, that though the form and constitution of a government be changed, yet a treaty concluded with the nation, during the former organization of their political system, still remains binding on all the parties to it. Vattel, lib. 1. c. 12.

The emigration of the plaintiff did not alter his character, as a citizen of France. It seems admitted, that he did not come into Pennsylvania in order to change his country, absolutely, and at all events. His dislike to the pure democratic government of France, has sprung up since his arrival here. He sus-

tained the important character of a suppleant in St. Domingo in 1791 and 1792, under the democratic party of the Fayette limited monarchy. Why does not the plaintiff now file his affidavit, that he is not a French citizen ? It looks like subterfuge.

[Here the plaintiff being in Court, offered to take the affidavit proposed ; but was prevented by the Court.]

The Pennsylvania act of 13th March, 1789, was founded on the 42d section of the former plan or frame of government of this commonwealth ; and the 4th section of that act expressly directs that nothing therein shall alter or affect that section of the old constitution. But this bond of union ceased on the 2d September, 1790, when the new constitution was formed by the people of this state. The power of establishing an uniform system of naturalization is now vested in the congress of the United States, by the 8th section of the 1st article of the constitution thereof ; and the people of this commonwealth, by adopting that constitution, have bound themselves that their laws shall be conformable thereto. When the congress therefore passed their naturalization act of the 26th March, 1790, and directed that the oath of allegiance should be taken in a Court of record, the act of assembly of 13th March, 1789, was virtually repealed thereby. Under the laws of congress, residence alone will not confer the rights of citizenship. The oath taken before alderman Baker, not being in the mode prescribed by Congress, is of no avail.

Notwithstanding all that has been offered, if Caignett was the defendant, instead of the plaintiff in this suit he would be entitled to the provisions of the convention, though he possessed aristocratical principles. Why, as the plaintiff, should his situation be bettered ?

The cases cited from Vattel are confined to two independent sovereignties or parties, in the same nation. A man must be a citizen of some one country ; it would be a solecism in government to suppose it to be otherwise. This very point has been so determined in the Supreme Court of the United States, between Yost Jansen *vs.* William Talbot, in February term last. One Ballard, a citizen of Virginia, dissolved his allegiance under a law of that state, but did not become a citizen of France. Talbot was admitted a French citizen, but did not abjure his former allegiance to Virginia. The Supreme Court held that Ballard continued a citizen of the United States, notwithstanding his oath under the Virginia act ; and he not having become a citizen of any other state or empire, and having been outfitted illegally in Savannah, and without a proper commission, the capture made by him was declared to be illegal. Judge Patterson in

particular said that the considering a man as a citizen of the world was a fanciful idea.

The Court took time to advise hereon ; and afterwards in the same term, M'Kean, C. J. pronounced the unanimous opinion of the judges, that the plaintiff under all the circumstances disclosed to them, could not possibly be considered as a citizen of France, at the time of the commencement of the suit ; he was therefore not precluded, by the terms of the 12th article of the consular convention, from bringing his suit in any Court of the United States. The Court without giving any opinion on the first point argued,

Discharged the motion.

Messrs. Lewis, M. Levy, and Moylan, *pro quer.*

Messrs. Ingersol, Dallas, and Du Ponceau, *pro def.*

RICHARD ROE, lessee of TUSAN LOPEZ, and ANNE, his wife, in right of the said ANNE, *vs.* JACOB MAYOR and HUGH HENRY.

Same lessee against GEORGE LUDLAM.

In ejectment, baron and *feme*, in right of *feme*, advantage may be taken on the general issue of the woman being the wife of another person.

EJECTMENTS for lands in the county of Philadelphia, with notices to appear at the last September term. On the 1st December, 1794, the tenants appeared, entered their pleas of not guilty, and into the common rule.

On the 8th April, 1795, the following special plea in abatement was filed in the first suit, and verified by the oath of Hugh Henry, which was agreed should extend to both suits.

“ And the said Jacob Mayor and Hugh Henry, executors of the testament and last will of Joseph Le Blane, deceased, by Robert Henry Dunkin their attorney, pray judgment of the writ aforesaid, because that the said Anne at the time of suing out the writ aforesaid was and still is the wife of William Adair, who is yet in full life, to-wit, at Philadelphia, in the county of Philadelphia, and was not, neither is, the wife of Tusan Lopez, as is alleged in the said writ, and which said William Adair is not mentioned in the said writ aforesaid. They therefore pray judgment of the said writ, and that the same be quashed.”

Robert Henry Dunkin, *pro def.*

The plaintiff's council excepted to the plea as frivolous, and tending merely to delay. Besides, if there was a necessity of entering a plea, it should have been done before the joining of the general issue, or at least have been pleaded since the last continuance.

Per Curiam. There is nothing in the plea in abatement which the defendants could not take advantage of at the trial, on the general issue. If Anne was the wife of Adair and not of Lopez, the latter could not join with her in making the lease laid in the declaration, and consequently, the plaintiff must be non-suited for want of showing a title in himself. Though the lease to the nominal plaintiff be a fiction, which is admitted by the common rule, yet it must be pursued with correctness and accuracy.

Messrs. Ingersol and Duncan, *pro def*, withdrew their pleas.
Messrs. Lewis and Wilcocks, *pro quer*.

PATRICK M'NEAL *vs.* MARGARET SMITH.

Where there is reason to believe that a bond has been given to defeat creditors, Court will decree an issue to try the validity of the bond and quantum of the debt.

SUB rule to show cause why a judgment entered up and execution issued thereon, should not be set aside.

It appeared that in June, 1794, the defendant gave a bond to creditors, payable at a future day; that shortly before the same became due, she executed a bond and warrant to the plaintiff, conditioned for the immediate payment of 130*l.*, on which judgment was entered and *fi. fa.* issued to last September term, on which the whole of the defendant's property had been levied; that this last bond was dated 6th August, 1794, and on the 8th of the same month was assigned to Lawrence Smith, the defendant's son, in consideration of five shillings, and by him assigned to John M'Masters, on the 5th September following. Dallas, 119. Gerard *vs.* Basse, *et al.* was cited by Mr. Todd for the creditors.

Per Curiam. Here are strong circumstances of suspicion against this latter bond. Where there is reason to believe that a bond has been given to defeat creditors, the Court will direct an issue to try the validity of the bond and quantum of the debt; which was done accordingly in this case.

Mr. Sampson Levy, *pro quer*.

HIGH COURT OF ERRORS AND APPEALS.

SITTING BY ADJOURNMENT 16th SEPTEMBER, 1795.

Present, CHEW, PRESIDENT, M'KEAN, SHIPPEN, YEATES, SMITH,
AND BIDDLE, JUSTICES.

JAMES HANNUM and GEORGE HARLAM, plaintiffs in error, *vs.*
JOSEPH SPEAR, defendant.

Lands aliened *bona fide* by executors under a power to sell for payment of debts, purchaser may defend himself against future debts of the testator. *Aliter* where the power is for payment of legacies, for in such cases the debts continue as liens on the lands sold.

THIS cause came before the Court on a bill of exceptions, agreed by counsel to be sealed by M'Kean, C. J., on a trial had before him and Justice Yeates, at West Chester, on the 28th April, 1794, when a verdict was found for Spear, the then plaintiff.

The action was brought in debt, for 939*l.* 8*s.* 10*d.*, on a bond, dated 29th November, 1784, conditioned for the payment of 469*l.* 14*s.* 5*d.* on the 29th April, 1785. The defendants pleaded payment, with leave to give the special matters in evidence. The plaintiff replied *non solverunt*, and issue.

After a verdict for the then plaintiff for 735*l.* 2*s.* debt, and judgment thereon, in the Supreme Court, a writ of error was brought to July term, 1795.

The substance of the bill of exceptions was as follows: "The defendants on the trial gave in evidence to support the issue on their part, that the plaintiff, together with Jacob Ohandler, now deceased, were executors of the testament and last will of Elizabeth Ring, and as executors under the powers given to them by the will (*prout* will), had, on the 29th April, 1784, sold to the said James Hannum, 140 acres of land in West Marlborough township, in Chester county, for 8*l.* 19*s.* 6*d.* per acre (*prout* conditions of sale). That on the 29th November, 1784, the said executors made a deed to the said Hannum for the said lands (*prout* deed), and that on the same day the said bond was given by the defendants to the plaintiffs for part of the purchase money.

"The defendants gave also in evidence that Elizabeth Ring died indebted to several persons, in particular to Thomas Gibson and Hannah, his wife, in 1256*l.* 4*s.* 4½*d.* more than she left personal estate sufficient to satisfy, of which debt, at the time of the purchase aforesaid, by the said James Hannum, he had no notice, and for which sum of money the said Gibson and wife,

subsequent to the 29th November, 1784, the date of the deed, instituted a suit in the Court of Common Pleas of Chester county, and on the 16th September, 1788, recovered judgment, with costs, against the estate of Elizabeth Ring aforesaid, which judgment was affirmed in the Supreme Court.

"The defendants further gave in evidence, that after they had received notice of the several debts aforesaid against the estate of the said Elizabeth Ring, and in particular of the claim of Gibson and wife, to-wit, in the end of 1785, or beginning of 1786, the said Hannum told the plaintiff he was willing and ready to pay the consideration money for the said lands, provided he could have a good title secured to him therefor; but as he was not safe in paying more money on account of the debts aforesaid against the estate of the said Elizabeth Ring, he then offered to the said plaintiffs, if they would return him 126*l.* 6*s.*, the money he had paid them (which was paid after November, 1784, and before 1786), they should have the lands again.

"Whereupon the counsel for the defendants insisted on their behalf, that the aforesaid debt due from Elizabeth Ring to Gibson and wife, was a *lien* upon the real estate sold as aforesaid, and that the plaintiffs could not make a title to the said James Hannum for the said lands, and that the consideration of the said bond failed; and therefore the defendants were entitled to a verdict, and the said counsel did pray the said Justices to allow the said matters and proof to be sufficient to entitle the defendants to a verdict.

"But the counsel for the plaintiff insisted that the said matters and evidence were not sufficient to entitle the defendants to a verdict; and did insist that, together with the tract of land so purchased by the said James Hannum, two other tracts of land were mortgaged by Nathaniel Ring and the aforesaid Elizabeth, his wife, to Joseph Parker, by deed dated 24th July, 1765, for payment of 69*l.* 10*s.*; that one-half of the purchase money was agreed by the said James Hannum to be paid to the plaintiffs in one month after the sale (*prout* conditions of sale); that if the said James had complied with such his engagement, the said executors could have discharged the said mortgage on the three tracts of land aforesaid, the one-half of the purchase money being 628*l.* 2*s.* 2*d.*, or thereabouts, and the sum due on the said mortgage being 832*l.* 1*s.* 6*d.*, or thereabouts; that the said James failed in complying with his engagement in that particular, having paid no money till the fall of 1784, when a deed was made to the said James Hannum, by the executors of the said Elizabeth Ring, of the premises,

subject to the said mortgage; and the said James then entered into an engagement with the plaintiffs, dated 29th November, 1784, to pay the said mortgage of the said three tracts of land to the representatives of Joseph Parker, and to procure, by the 29th of April, then next, a release of the said mortgage of the three tracts (*prout* bond of indemnity).

“ The counsel for the said plaintiff further showed in evidence that the said James Hannum did not pay the mortgage, or obtain the release aforesaid; and that a suit was afterwards brought on the said mortgage, and a mill and the said three tracts of land were sold by the sheriff of the said county for 1302*l*. That the said Gibson, the creditor of the said Elizabeth Ring, told the said James Hannum, that there should be nothing wanting that he or his wife could do to strengthen the title of the said James to the said lands; and the said counsel insisted that the consideration of the bond had not failed, unless through the default of the said James Hannum; that if the said James had done what he covenanted to do, the said executors could have made him a good and indefeasible title to the lands so purchased by him; that by compliance with his covenants he might have secured to himself the said lands sold to him by the executors; and that the debt due from Elizabeth Ring to Gibson and wife was not a lien upon the lands sold, as aforesaid, but that the title made by the said executors to the said James Hannum was a good title in fee.

“ And the said justices did declare and deliver their opinion to the jury, that the several matters produced and proved on the part of the defendants were not sufficient to *bar* the said Joseph Spear of his said action against the said defendants, and that the debt due from the said Elizabeth Ring to the said Thomas Gibson and Hannah, his wife, was not a *lien* upon the lands sold, as aforesaid; but that the conveyance made by the said executors, under the will of the said Elizabeth Ring to the said James Hannum, for the said lands, passed a good title in fee simple, and with that direction left the same to the jury.

“ The counsel for the said defendants excepted to the said opinion of the Court, and insisted that the several matters produced and proved were sufficient to bar the plaintiff.

“ The jury gave a verdict for the plaintiff for 73*l*. 2*s*. debt, and six pence costs.

“ Signed and sealed by consent of counsel on both sides, 17th July, 1795.

“ THO. M'KEAN.” [L. S.]

The following is an abstract from the will of Elizabeth Ring, dated 17th January, 1784, referred to in the foregoing bill of exceptions:—

“And now for settling my temporal estate. First, I will that all my just debts, &c., be paid. I give unto my grandson, Jacob Chandler, my grist and saw mill, with the land on that side of the road, in fee; and I do in consideration thereof, will and allow that the said Jacob Chandler shall pay unto widow Norris all the mortgage demands that I owe her. I give to Joseph Spear the plantation whereon I live, in fee, he paying 300*l*. besides what he has paid, towards discharging my just debts. And I will and allow my plantation, called the Indian Fields (the lands sold to James Hannum), to be sold by my executors, at what time they see best convenient after my decease, and what will *remain* from the sale thereof, I allow to be divided in proportion among *the legatees*, after all the legacies *is* paid. And I allow all my personal estate to be sold by my executors and divided among my legatees. I appoint the above named Joseph Spear and Jacob Chandler to be the executors of this, my last will,” &c. In the former part of the will she had devised several legacies, amounting to 380*l*.

The conditions of the sale of the Indian Fields Tract, dated 29th April, 1784, were, that “one-half of the purchase money should be paid in one month, and the other half, with interest, in twelve months, giving security, if required. The executors to give a *sufficient deed*, in fee, when one-half of the purchase money should be be paid.”

The bond of indemnity from the defendants to the executors, dated 29th November, 1784, was in the penalty of 2000*l*.

“It recited the mortgage to Parker, and Hannum covenanted thereby to take it on himself, the same to go in part of his purchase-money, and also to procure a release of the other two tracts from the mortgage, by the 29th April, then following, and to indemnify the executors against all damages and costs on the mortgage.”

The case was argued with much ability, on the 27th July and 25th August last, in the Court of Errors and Appeals, by Messrs. Lewis, Tilghman, J. B. M’Kean, and J. Ross, for the plaintiffs in error; and by Messrs. Ingersol and Wilcocks, for the defendant. The reporter was not present during those arguments, having sat at *Nisi Prius* in the decision of the cause; but having been favored with the notes of two of the judges who attended, he submits the following extract, as containing the general outlines of the reasons offered on both sides:—

The plaintiffs in error insisted that the executors on the face of the will had full notice of the fund appropriated by the testatrix, for the payment of Parker's mortgage, viz: the lands devised to Chandler, which were subjected to the payment thereof. So unmindful, however, were they of their trust, as to attempt to raise the money from the sale of the Indian Fields Tract. Lands in England were not bound for the payment of simple contract debts after the death of the party, nor even for specialty debts in the hands of a devisee, until the stat. of 3 and 4 W. and M. c. 14, which created a lien from the time of the suit brought. 3 Bac. Ab. 25, 26. Carth. 245. That statute made lands liable in the hands of a devisee, in the same manner as if they had descended to the heir. Our municipal acts were intended to reach much further; but previous to their being enacted, lands in Pennsylvania in the hands of heirs or devisees could not be taken in execution for the payment of debts.

The most early act on this subject is to be found among the laws agreed on in England in 1682, § 14, by which all lands and goods were subjected to pay debts, except where there was legal issue; and then all the goods and one-third of the lands only. Appen. to Prov. Laws, ed. 1775, pa. 7.

The next act, chap. 51 (Appen. 7), subjects one-half of the lands to the payment of debts, provided they were bought before the debts contracted.

Then came the act, chap. 119 (Appen. 9), which directed how the estate of a deceased person should be disposed of, "his debts being first paid."

The act of 1688, chap. 189 (Appen. 10), makes all lands liable to sale, on judgment and execution against the defendant, his executors or administrators.

The act of 1700 makes the same provision, and in the same extensive terms, adding the words, "where no sufficient personal estate is to be found." Prov. Laws. ed. 1775, pa. 6.

So the act of 1705, for the better settling of intestate's estates declares in what manner the surplusage of the intestate's estate shall be divided. Prov. Laws, 35, § 8.

The second act of 1705, expressly provides, that all lands shall be liable to be seized and sold, upon judgment and execution obtained. Prov. Laws, 49.

When these different laws were enacted, the colony was in its infancy; lands formed the capital property of our ancestors, and the debts contracted by them were chiefly formed on the purchases of real estates. It was therefore highly just and reasonable, under the then existing circumstances, that lands should be liable for the payment of all debts, and that no testator shall

have it in his power to defeat these wise provisions. Nor is the wisdom of the measure less conspicuous at the present day.

In the case of *Graff vs. Smith*, the principle is established, that a lien is created on the death of a testator, on lands devised for payments of debts. Dall. 483.

If any doubts could possibly arise on these laws, and after this decision, a legislative exposition by the act of assembly of 19th April, 1794, would certainly remove them. The second section of that act (pa. 523), expressly recites, that "inconveniences might arise from the debts of deceased persons remaining a lien on their lands and tenements an indefinite period of time after their decease, whereby *bona fide* purchasers might be injured, and titles become insecure;" and makes certain provisions to obviate the supposed difficulties.

In England, where a power is given to executors to sell for payment of debts, a purchaser is not bound to look to the application of money, unless there is a schedule of such debts.

And where the heir has aliened before a suit brought, the purchaser is secure, but the heir is subjected by the statute to pay the value. Our acts of assembly were made for the avowed purposes of preventing creditors from being defrauded, and therefore to attain those ends effectually, must be liberally construed in favor of creditors. It may be said, that the law creates a lien against the debtor himself, but not against his executors or administrators. But the obvious answer thereto is, that the creditor reposes a confidence in his debtor, but none in his executors, &c., and the most proper period for the lien to commence is on the death of the party trusted. Besides, the creditor has a personal remedy against the debtor, but none against his executors. The condition of a creditor would be much altered for the worse unless the lands were bound from the decease of the person indebted to him. An executor may be poor and dishonest, and waste or run away with the money. So of the heir, and though neither of them have been trusted by the creditor, he runs the risk of them both, and thereby may be deprived of his just dues.

It may be further said that a power to executors to sell may be necessary to answer family purposes, and that it would be unreasonable to deprive a person of the power of creating a trust. But it is clear that although a man has such power, he cannot exercise it at the expense of his creditors. His property must be subject to their fair demands, and though some evils may arise from a sheriff's sale being more expensive than that of executors, they can only hold where sales are necessary for payment of debts. If the purchaser amongst us is not bound to see

to the application of the money, legatees may be preferred to creditors. Executors may prove insolvent, and the interests of creditors be effectually defeated thereby.

It is admitted that a creditor may levy his debt on the lands of a devisee, or of his alienee. And why may he not levy on lands in the hands of purchasers from others, who have bought from executors, vested with an authority of selling? In the case of *dower*, a *bona fide* purchaser, without notice, shall not hold the lands exempt from the claim of the widow. A purchaser may protect himself, by inquiring whether any debts of the deceased remain unpaid; and if his mind is not fully satisfied on the result of his labor, may demand security from the executors, before he completes his contract; but a creditor has no earthly mode of making himself secure. To favor the interests of a particular legatee, executors may privately sell the most valuable lands at an under-rate, without any control on the part of the creditors.

It may likewise be objected that the Legislature have given power to the Orphans' Court to direct the sale of intestates' lands in certain cases; and that having made no such provisions in the case of wills, they must be supposed to have left it to testators to give such direction themselves. To this it is answered, that let the law be as it may, with respect to powers granted to executors to sell for *payment of debts*, this is the case of an authority to sell for *payment of legacies*. Perhaps a power to executors to sell at such time as they may think proper may amount to a devise to executors, with an authority to sell.

The bill of exception states that the testatrix died possessed of more personal property than was sufficient to pay her debts. She does not appear to have designed that the Indian Fields Tract should be sold to discharge her debts. On the contrary, she has charged one plantation with the payment of 300*l.*, and another with the whole amount of the mortgage money. To vest testators with the uncontrolled right of ordering lands to be sold for the payment of legacies, would deprive creditors of their debts, be destructive of credit, and introductive of fraud. One indebted cannot convey in trust, or otherwise, without a valuable consideration. A purchaser with notice of a trust must hold the lands subject to the trust. If the trust appears in any of the title deeds he is bound to see to it. In this case, the power appeared in the *will*, and to be for payment of *legacies*; and therefore, as Hannum was bound to look at the will, he had notice of the trust.

The executors were the trustees of the *legatees*; and it is immaterial whether the words of the will made them devisees, or

gave them a mere authority to sell. It will not be contended that lands cannot be taken in execution in the hands of devisees. If there is a mere authority to sell, the purchaser necessarily comes in under the testatrix, and the result would be, that she undertakes to sell for the benefit of legatees, her debts being unpaid.

Moreover, the executors were trustees, and must pay legacies, and not debts. They could not sell without power, and they were bound to pursue the power by paying legatees. The money arising on the sale of the lands in question could not go into their hands as chattels, or assets, for the payment of debts. To say that lands are chattels for the payment of debts, is by no means an accurate expression, for then the executors or administrators might sell lands without any power given to the former by will, or to the latter by order of Court, which it will not be pretended that either of them can do legally.

The defendant's counsel stated the matter before the Court to rest on a single question,—whether, when an executor sells lands pursuant to a power granted by the will, such lands are liable to be taken in execution in the hands of a *bona fide* purchaser, for the payment of the debts of the testator?

If one cannot by will direct the sale of his lands for family purposes, it would be highly inconvenient; it would be in effect to say, that one shall not order his lands to be sold, and that he must necessarily submit to the delay and expense of having them sold by the sheriff.

Whatever may be done *circuitously*, may be done *directly*. If it may be done by deed, so may it by will. One may convey his land to trustees, to permit him to take the profits during his life, and after his death to sell them for the payment of his debts or legacies; and yet such trustees in general could not be compelled to give security. If the same object may be obtained in another mode, by will, and at less expense, why may it not be done? Bacon's Law Tracts, 93. A will of land is considered in nature of a conveyance to uses. It is a species of conveyance. 2 Black. Com. 378. It operates by way of *appointment*, 2 Woodeson, 348, and therefore, must be considered as taking effect from the date of the will, and this is the true reason why lands acquired after the making of a will, cannot pass thereby. Cowp. 90.

It is however objected that this power may be abused by executors; that a testator may direct his lands to be sold and the money given to children, &c., that executors may be dishonest, or become insolvent, &c. Yet may not lands be sold to satisfy

a feigned debt, on the application of dishonest administrators to an Orphan's Court; and after sale, may they too not waste the money, run away and become insolvent? It will be admitted on all hands, that in case of fraud and collusion, either in the sales of executors or administrators, that their proceedings would be thereby invalidated.

Trusts created in wills are favored by the law. 21 Vin. 505, pl.

1. Courts of justice encourage provisions made by testators for the payment of their debts. 1 Vez. 215. Devises of lands in England are void against creditors by specialty, by stat. 3 and 4 W. and M. c. 14. And yet a devise for payment of debts is held to be out of the statute. 2 Vez. 590. So though all devises of lands where the heir is bound are void, yet it has been adjudged that a devise for payment of debts is not affected thereby. If the bond creditor, commencing his suit in England, creates the lien, and convenience has been derived there from it, why should we not adopt the same principle here? Where executors there sell under a power in a will for payment of debts, creditors can have no recourse against a purchaser, who is not bound to see that the money be properly applied, unless there be a schedule particularizing the debts. Ambl. 188. Gilb. Chan. 220, 2. Vez. 587. Prec. Cha. 397. Cha. Ca. 249. And if the purchase is fairly made, though the executors waste the money, a creditor cannot pursue the lands.

It is insisted upon that such a power vested in executors is inconsistent with our acts of 1700 and 1705. It is answered, that the first of these laws only makes lands liable for the payment of debts, and the latter is little more than a repetition of the same thing, and that the object of the legislature went no further than to make lands chattles for the payment of debts. It is not contended that executors or administrators have the same power over real estate that they have over personal property, but merely that they form a part of the assets of the deceased in case of the deficiency of the latter fund. Consequently, the rules respecting both species of property in the present particular, should be uniform; and inasmuch as the personal assets of a testator cannot be followed in the hands of a fair purchaser, for valuable consideration, 1 Atky. 463, 2 Atky. 41, so neither should lands *bona fide* sold by execution, under a proper power.

There is no principle laid down in the decision of *Graff vs. Smith* (Dall. 48), which can affect the question before the Court in favor of the plaintiffs in error. It is there said that the lands, whether of a testator or intestate, are made a fund for the payment of debts. The heir or devisee not being liable to give security, the creditors would be defrauded unless they could fol-

low the lands in the hands of a purchaser, to whom the heir or devisee would immediately sell them. This reasoning does not apply to a trustee executor. Again, in pa. 486, purchasers under orders of Orphan's Courts are safe, though the money be squandered; the administrator has as much power to sell the specified lands as he has to sell chattels.

An administration bond is always calculated with reference to the personal estate. But the Orphans' Court, on directing a sale of real estate, may oblige the administrator to give security, to apply that money properly. There is not that security in the heir or devisee, which is attributed to an executor, whom the law supposes to be worthy of trust. But if executors acting under such a power can be compelled to give security, there is a complete analogy between such sales made by them, and those made by administrators under an order of Orphan's Court.

In case of the probable insolvency of an executor, he may be compelled to give security. *Dall.* 483. And the Orphans' Court, which in this instance resembles a Court of Equity, may, on good grounds, compel an executor trustee, before he enters on his trust, to give security, as well as afterwards. Chancery where the executor is considered as a trustee, will call upon him to give security, in case of probable insolvency. *Lovel. on Wills*, 190. And in some cases, the executor may be called upon to give security to pay a legacy. *Ib.* 213. *Cites 2 Bac. Abr.* 377. *1 Cha. Ca.* 121. *Law of Testam.* 187. *1 Rol. Abr.* 285.

In the case before the Court it appears that there were minors interested; and under such circumstances executors and trustees may be called on to give security. (*Prov. Laws*, 71, § 3.)

The powers given to the Orphans' Court, to direct the sale of intestates' lands, in order to pay debts and bring up children, are only substitutions for the usual powers given to executors by wills.

Again, it is objected that the power given here to the executors to sell, is for the payment of legacies, and not of debts.

It is answered that the testatrix has expressly provided for the payment of her debts, and the expense and inconvenience which will be incurred in obliging creditors to sue for their debts, will be equally experienced by the legatees, who must sue for their legacies. When the money produced by a sale of lands comes into the hands of the executors, it is a fund for the payment of creditors, who will be paid in preference to legatees. Besides, the legatees are not entitled to their moneys until they offer refunding bonds, with security, to the executors; and these bonds can be recurred to in case future debts appear.

Devise of real estate to trustees to sell, and pay debts and legacies generally, the trustees sell and embezzle part of the money, the purchasers are not liable to the debts. Ambl. 188.

The question before the Court will ultimately result in this inquiry,—which construction of the acts of assembly will be most expedient and attended with the fewest inconveniences, as well to creditors as legatees? It is submitted that the construction contended for by the defendant gives creditors an equal security with that opposed to them, promotes the interests of legatees, saves great delays and much expense. The general practise and sentiments of the people of the state, it is also hoped, is with the defendant on the present question. *Curia advisare vult.*

And now on the 16th September, 1795, the Court of Errors and Appeals proceeded to give their opinions *seriatim*.

Chew, President, stated the different facts set out in the bill of exceptions, and then observed as follows, *in substance* :—

The judges at *Nisi Prius* ruled that the demand of Thomas Gibson, and Hannah, his wife, was not a *lien* on the lands sold to James Hannum by the executors, under the power given to them by the will of Elizabeth Ring, and that nothing short of mortgages and judgments against their lands, anterior to the sale, would have operated as a *lien*.

The nature and legal operation of the power granted to the executors is the most material point to be considered; whether the authority was given to them for the payment of the debts, or legacies of the testatrix. If that power was vested in them for the former purpose, I should strongly incline to think that the sale would have transferred to the purchaser a good title, exempted from the debts of the testatrix, unless there had been a schedule, directing the appropriation of the money to particular creditors. *Usage* best expounds a law; and such numerous sales of this description have been made in Pennsylvania, and the titles to the lands thus *bona fide* sold have never been questioned, that it would now be dangerous to impeach them. The execution of powers of this nature has proved highly beneficial to creditors, and has greatly conduced to the interests of the representatives of the parties deceased. But I would not be understood to have a decided opinion on this point. I view the present case as a power devised for the payment of *legacies*, and not of *debts*.

Elizabeth Ring, by her will, charged the lands devised to Jacob Ohandler with the payment of the mortgage money due to the representatives of Joseph Parker, and the plantation whereon she lived, to Joseph Spear, with the sum of 300*l*. The Indian

Field Tract she orders her executors to sell, according to their best discretion, and to divide what will *remain* from the sale, in proportion, among the legatees, after all the legacies are paid. She had previously bequeathed legacies amounting to 380*l.* to several persons, in different proportions. "What will *remain* from the sale" can only mean the surplus, after paying those particular pecuniary legacies. The legatees, therefore, were the sole objects of her bounty, in this clause of her will, whereon the question arises, and her executors had no power to sell for the payment of debts; consequently, the lands remained liable to the claims of her creditors, and their *liens* continued as fully as if there had been no sale. As the executors, therefore, could not, under their sale, give a good title to Hannum, freed from the demands of the creditors of the testatrix, I am of opinion the consideration of the bond failed, and that the executors were not entitled, by law, to recover thereon, and that the judgment in the Supreme Court be reversed.

Shippen, J. Two points arise in this case. 1. How far lands in Pennsylvania are bound to satisfy the debts of deceased persons. 2. If they are bound, how far a devise of the debtor's lands, to pay his debts or legacies, will interfere with that principle.

Restraints on the alienation of real property in England were coeval with the *feudal* system. The favorite of that system, next to the lord, was the heir at law. Without his consent, as well as that of the lord, the feudatory could never transfer his estate to another, and he could in no case subject his lands to the payment of his debts. It was by slow degrees that these feudal obligations were impaired; and to this day they are not wholly removed; for a moiety, only, of the lands of the debtor, is subjected to the execution of his creditor, in England.

Our ancestors, the first inhabitants of Pennsylvania, viewing this system in its true light, and seeing the wisdom as well as justice of subjecting every kind of property to the payment of debts, made it one of their first articles, which they called *laws agreed upon in England*, before their embarkation to this country, that lands should be subjected to pay their debts. This law they confirmed immediately after their arrival here, by the act of union, passed at Chester, in the month of December, 1682.

In a few years after, they enabled executors and administrators, by conveyance or bill of sale, with the approbation of the Court, to sell the lands of a deceased debtor, for the payment of his debts. It was an object they never lost sight of. The first laws upon that subject having excepted the case of a man hav-

ing *legal issue*, in which case only half the lands were made liable to debts, they at length took off even that restraint; and by the act of 1700, in order, as the legislature expresses it, that no creditors may be *defrauded* of their "just debts," they expressly enact, that "All lands and houses whatsoever" should be liable to sale, upon judgment and execution, to satisfy creditors. It was no longer in the discretion of widows, executors, or administrators to sell the lands of deceased persons by conveyance or bill of sale; but to complete their intention that no creditors might be defrauded of their debts, the sales were to be only by execution under a judgment. Is it possible to conceive that, with all this just *care* of creditors, the legislature should ever mean to leave it in the power of heirs or devisees, by the flimsy expedient of selling the lands of the deceased, before judgment could be obtained against the executor or administrator, entirely to defeat the whole system of their laws in favor of creditors, whose interests they had thought proper to prefer, even to the *minor children* of the deceased?

It has been suggested that nothing appears in our acts of assembly to make lands *assets* for the payment of debts, in any other manner than goods and chattels were assets at law in the case of deceased persons. It is apparent from the whole tenor of the acts of assembly, that the legislature meant to afford the creditor equal security for his debt, in the lands of deceased persons, as in his *goods* and *chattels*. As to the latter, they are confessedly bound from the death of the debtor; they immediately go into the hands of the executor, or he has an immediate right to reduce them into his possession, and they, or the produce of them, are bound to discharge the debts of the creditor. As to the lands, the executor, *as such*, has neither possession of them, or power over them, nor is in any sort responsible for them; they are indeed, by a kind of fiction, supposed to be in his hands, because the execution directs the debt to be levied "Upon the goods and chattels, lands and tenements of the deceased, in the *hands* of the executor." But really and in fact, they are, till sold by execution, in the hands of the heir or devisee; and if the legislature meant lands to be a fund, equally with goods and chattels, for the payment of the debts of deceased persons, they must have meant that they should be bound in the hands of the heir or devisee, in the same manner, and from the same time, as goods and chattels are bound in the hands of the executor; otherwise they would amount to no fund at all, as they might be disposed of by the heir or devisee, at any time before judgment against the estate of the testator. It could surely never be the meaning of the legislature, to *mock* the creditors, with the prospect of so precarious a fund as thial

At the bar, however, this point does not seem to be seriously contested; indeed, since the act of April, 1794, how can it now be contested? For although the act has no retrospection, yet the legislature most strongly recognizes the principle that the lands of deceased debtors are bound from the time of their deaths, not only by the strongest *negative* implication, when they say that the lien shall not continue longer than seven years after the decease of the debtors, but *positively* and *expressly*, by saying that their lands shall be subject to the lien of *infant, absent* or *non compos* creditors, for seven years after those impediments shall be removed; so that I take it this question is now entirely at rest.

The next point to be considered is, how far it is consistent with the above principle, that testators may, by their last wills and testaments, direct their lands to be sold for the payment of their debts, for the payment of legacies, or for any other purpose? And although there is not the same necessity here as in England, to exercise the testamentary power in order to do justice to creditors, because, without such kind of devises, the whole real estate in that country would be swept away from the creditors by the heir at law, except in cases of obligations, and other specialties, wherein the heir is expressly bound; yet there undoubtedly may be cases where there would be the utmost propriety, as well as necessity, for the exercise of a similar power here, as well for the more easy and fair distribution of a testator's estate among his children, as for saving the expense attending the recovery of judgments, and selling their real estates by execution. And I see no good reason for limiting or restraining the power in any case which does not militate against the principle of the lands being expressly charged by law with the payment of the testator's *debts* in the first instance; as, if a testator devises his lands to be sold by his executors for the payment of his *debts*, and the executors sell the lands and pay the debts with the proceeds of the sale; and especially if, in doing that, they do not violate the directions of the law, as to the priority and dignity of debts. I see no more reason why the purchaser from the executors should be disturbed in his possession of the lands, by any unsatisfied creditor issuing a subsequent execution against them, than a purchaser under a sale at the suit of a prior mortgagee can be disturbed by a second mortgagee, where the land did not sell for more than was sufficient to satisfy the first. In both cases the fund is fairly exhausted, and no injustice done, nor law infringed. But this does not appear to me to be the case, where the testator directs his land to be sold for payment of *legacies*. A purchaser from executors under such

a power must know or ought to know that in the first instance the land is charged by law with the payment of the testator's debts; that he was bound to be just before he is generous; and that although a testator unincumbered with debts might legally give such a power to his executors, yet it is impossible for him to do it, to the prejudice and exclusion of his creditors, who have a legal security in the land. The testator in his life time, if indebted, could not make a gift, or execute a voluntary conveyance of his land; such a gift or voluntary conveyance would be deemed fraudulent as against creditors. If this could not be done in his lifetime, *a fortiori* he could not do it by his last will, which does not take effect till his death, from which moment it is pledged by law to those creditors.

It has been contended that when a testator devises his land to be sold by his executors for any purposes whatsoever, even for the payment of legacies, yet when the money arising from the sale comes into the executor's hands it will be considered as assets, out of which the debts must be first paid. To this I answer, that under such a devise, the executor is a trustee for the particular purpose mentioned in the will, and he is authorized to sell for that purpose only. The power might as legally have been given to another person as to the executor; and how in that case could the produce of the sale be considered as assets for the payment of debts? The executor, *as executor*, has nothing to do with the land; and as a trustee, he must be considered in the same light as if he was not executor; unless in the case of a devise to pay his debts, in which case he is a trustee for the creditors. Upon a contrary idea, the executor selling land for the payment of legacies, must appear in a truly ridiculous situation. As an executor, it is said he is bound to pay the debts out of the money raised by a sale, under a power to sell for the benefit of legatees; and as a trustee for those legatees, he is compelled to commit an express breach of trust by paying those debts. I can find no instance in the books of a devise of a power for the sale of land for the payment of legacies, where the produce of such sales was ever considered assets for the payment of debts; although in every case that can possibly bear the construction of a devise for the payment of debts, the judges appear inclined to give that construction, for this evident and just reason, that, unless it be under such devises, the lands cannot be made subject to the payment of debts. There is certainly greater reason in this country to comply with the will of the testator, and not to divert his intention, as no injustice can possibly be done to his creditors by it, they having a prior legal security in the lands.

For these reasons, I think the sale by the executors of Elizabeth Ring to James Hannum could not have entitled him to hold the land, against the judgments and executions of creditors; and as he could not be secured in his title, he had a good defense against the action brought on the obligation; and consequently that the judgment should be reversed.

Smith, J. Before the argument, I stated to my brethren and to the counsel concerned, that if the general question, whether the debts of a testator be a lien on lands sold by his executors pursuant to a power in his will, in all cases must be determined in this case, I should not probably think myself at liberty to give an opinion thereon, unless the distinctions which had occurred to me, and agreeably to which I had acted, should be taken, viz: that all debts secured by mortgage or judgment, as well as specified and scheduled debts, are so far liens, as that the purchaser is to see that the consideration money is duly applied to the payment of these debts in due order. The reason I mentioned this was, that I, as executor, sold lands of the testator, and would have sold more could I have done it to advantage, and paid part of divers judgments with the money. I divided it nearly in proportion to those I did pay, but it was so small a proportion of the whole, that to several judgments for inconsiderable sums, I did not take the trouble of paying any. This was done at a time when I believed that the estate would not be sufficient to pay all the debts. I might therefore be supposed to be under the influence of prejudice, and of having in fact prejudged the point in a certain degree.

The general position was brought before the Court, and the distinctions not made at the bar; consequently, I do not think myself at liberty to go into a regular discussion of the question. But as the judges who have spoken before me think it necessary that I should declare my opinion, I have no hesitation in saying that I join in the opinion delivered by the president. I think that the purchaser of lands sold *bona fide* by an executor, pursuant to a power given in the will, is bound to see that the purchase money is duly applied to the payment of such debts as I have mentioned; but his title cannot be affected by other creditors, there being no collusion between the purchaser and executor, but the sale being fair, open, and regular. Many titles depend on such sales; their legality has never been disputed, and it is for the benefit of all parties that they should be supported; the inconveniences can neither be great nor frequent. However in strictness, it is not necessary to decide this point in the present case, because the power given by the will was to sell for the payment of legacies; the testatrix having devised other parts

of her estate to her executors, respectively, to-wit: one part to Jacob Chandler, subject to the payment of this very mortgage, under which he permitted the land in question to be sold, after he had joined in the sale of it to Hannum, and another part to Joseph Spear, subject to the payment of 300*l.* in addition to what he had paid before.

Could the executors make a good title to Hannum by this power, and under these circumstances? I think not. For were these devises to the executors even out of the question, they had only a naked power by the will, to sell the lands and divide the residue of the purchase money amongst the legatees, after the payment of the particular pecuniary legacies. This power to sell for the payment of legacies, like all other naked powers, ought to be strictly pursued. It was not even *substantially* pursued; the sale was made for the payment of debts. The executors had no power given to them to sell for this purpose, and could not give the purchaser a good title; consequently, he was not obliged to pay the purchase money.

It may be necessary to add that this point did not come before the Court at *Nisi Prius*. Had the land been sold under this power, in the will, and the money applied to the payment of debts in the first place, and after the debts were discharged, to the payment of legacies, I incline to the opinion that the purchaser's title would have been good against the heirs and devisees. If the purchase money was not sufficient to pay all the debts, I will not give any opinion, as at present advised, whether if the consideration money was paid in due degree, so far as it would extend, an unsatisfied creditor might, on a judgment obtained against the executors, have proceeded to levy on the lands. The judgment here must be reversed.

Biddle, J. I am of opinion that under a power granted to executors, by will, to sell lands for the payment of debts, the vendee would obtain a good title, unless prior mortgages, judgments, or recognizances bound the land; but I also think that under a mere power to sell for the payment of legacies, as in the present instance, the purchaser could not defend himself against the creditors of the testator, though such creditors were not secured by prior mortgages or judgments. I will only observe that this ground was not taken at the trial.

Judgment reversed.

[M'Kean, O. J., and Yeates, J., sat, during the delivery of the preceding opinions, one of them at least being necessary to form the Court, but neither of them gave any opinion.]

AT NISI PRIUS, AT EASTON,
SEPTEMBER ASSIZES, 1795.

Coram YEATES AND SMITH, JUSTICES.

JACOB MILLER *vs.* PHILIP LEONARD and JACOB RUSH.

Juries cannot reduce partial payments under the depreciation act of 3d April, 1781.

DEBT on bond. Plea, payment. It was admitted that there was a balance due to the plaintiff, and the only question was, whether the jury could legally reduce a partial payment made on the bond, of 150*l.*, on the 16th September, 1778.

The Court desired the counsel for the plaintiff to begin.

They urged that the depreciation act of 3d April, 1781, only respected contracts made between 1st January, 1777, and 1st March, 1781, and that the title and preamble of the act was conformable thereto. It only describes the province of the auditors, and is calculated for the settlement of transactions during the war, but is not binding on juries. Courts are bound to do substantial justice, unless restricted by the clear words of positive law. And Mr. Justice Shippen expressed his sentiments in a case at Berks county assizes, that the depreciation act is not obligatory on juries who are trying a cause. The bond on which the present suit is brought is dated 7th May, 1776.

E contra, the cases of Ball *vs.* Carson, and Gallagher *vs.* Watson, determined in the Court of Common Pleas of Philadelphia county, were cited, wherein a contrary doctrine had been adjudged.

Per Curiam. We have long thought that this question was at rest. We are not informed of the particular circumstances which came before Mr. Justice Shippen, in Berks, but we are fully satisfied that his general sentiments are adverse to the doctrine contended for by the plaintiff.

There is a general clause in the 4th section of the depreciation act, which includes *all contracts* made before the 1st March, 1781, and these plain words cannot be narrowed down or controlled by the title (Hardr. 234; 3 Co. 33; 1 Bl. Rep. 95) or preamble (1 Wms. 320; Fonbla. 428; Cowp. 232, 543; 5 Term Rep. 201) of the act. The positive terms of the law

are equally obligatory on Courts and juries as on auditors. There can be no reasonable ground of distinction between the two tribunals. If the reduction of a partial payment by auditors is prohibited, certainly jurors ought not to be at liberty to do it. If it would be wrong in the one case, it necessarily must be so in the other. The necessities of the war induced the policy of making continental money a legal tender, and no human wisdom can remedy the hardships which have been thereby occasioned to individuals. The plaintiff was not bound to receive part of his debt when offered to him, but he might do it if he pleased. If he had freely and willingly accepted 150 pieces of gilt leather for 150*l.* without any fraud being practised on him, he would have been bound by the acceptance. So have been all the resolutions that we know of. Two we recollect, one of Caldwell, surviving mortgagee, *vs.* Chambers et al. in Franklin county, May assizes, 1789, where a payment of 144*l.* made in August, 1779, was established by the Court on argument; and the other of Pleasant's administrators *vs.* Pemberton, administratrix, in the Supreme Court in bank, January term, 1793, where the general rule was laid down in the same manner. We clearly think that the jury cannot legally reduce this payment of 150*l.* made in continental currency.

The jury, conformably to the charge of the Court, found a verdict for the plaintiff for 41*l.* 1*s.* 7*d.* debt, with sixpence damages, and six pence costs.

Messrs. Read and M. Biddle, *pro quer.*

Messrs. Olymer and Thomas, *pro def.*

JACOB KACHLEIN and PETER IHRIE *vs.* JAMES RALSTON and
JOHN MULHOLLAN.

Unliquidated damages in covenant sounding in *tort*, cannot be defaulted under the plea of payment, in a suit on a bond.

DEBT on obligation, conditioned for the payment of 500*l.* on the 27th May, 1795. Plea, payment, with leave to give the special matter in evidence.

On the 19th January, 1793, the plaintiffs, by a certain article of agreement, covenanted to convey to Ralston, one of the defendants, a grist mill and three tracts of land near Easton, with all the privileges thereto belonging, reserving to themselves the right of swelling or damming the water on a tract below, called the Fulling Mill Tract, provided the water should not be raised so high as to injure the mill intended to be conveyed. On the

12th April, 1798, the plaintiffs executed a conveyance in pursuance of the article, and the defendants gave bonds for the residue of the purchase money, which was all paid except 750*l*.

The defendants, under their plea, offered to show in evidence, that the plaintiffs had erected a dam below, which had much injured the mill conveyed; and that a suit had been brought against the defendants by one Waggoner, for raising their dam, but at length on the argument, they relinquished the latter part of their motion.

Exception was taken to this testimony by the plaintiffs. The damages supposed to have been sustained are the object of a new suit, and cannot be considered as a set-off under the English statute, or our own act of assembly. The reason of the statute applies to mutual debts only. Cowp. 57. Unliquidated damages on a former sale of goods cannot be set off. 1 Bl. Rep. 304. So of damages in covenant. Cowp. 56. One tort cannot be set off against another. 4 Term Rep. 74. There is no set-off to an avowry for rent, *Ib.* 511. There are three kinds of covenants. 1. Mutual and independent. 2. Covenants which are conditions and dependent. 3. Where mutual covenants are to be performed at one time. Doug. 665. Mutual covenants unperformed on one part, are no excuse to the other. 1 Rol. Abr. 416. One covenant is not pleadable in bar of another covenant. 4 Bac. Ab. 116. 3 Lev. 4. The bond is transitory, and if the action was brought in another county, and the evidence be ruled to be admissible, the plaintiffs would lose the benefit of a view, which is of the utmost importance in cases of this nature.

The defendants answered; the rules of law and pleading are said to be founded on sound sense, and to subserve the purposes of substantial justice. Why should the defendants pay now, and be afterwards put to another suit to recover damages for the violation of the contract? Covenant will clearly lie in such a case. It will lie wherever the intent of the parties plainly appears. 1 Cha. Ca. 294. 6 Vin. 381, pl. 21. Anything under the hand and seal of the parties will make a covenant. 2 Mod. 91. 6 Vin. 381, pl. 22. *Absque in petitione, abnegatione, &c.*, in a deed, if grantee does not enjoy, will support covenant. 1 Leon. 277, pl. 375. 6 Vin. 379, pl. 12. 2 Com. Dig. 559. On a demise *reddendo* rent, covenant lies on non-payment. 6 Vin. 379. 2 Com. Dig. 560. Covenant lies, if one party does a matter which impedes the other in the enjoyment of his property. 1 Saund. 322. If lessee agrees that lessor shall have two rooms of a house, and a lease be of the house, except the two rooms and

free passage to them, if lessor be disturbed in his passage by lessee, covenant lies against him. 1 Salk. 196. 2 Com. Dig. 559. If one covenants to stand seized to the use of his son, *saving* that his wife shall have the loppings of the trees, if the son cuts down the trees, covenant lies against him. Cro. Car. 437. 2 Com. Dig. 559. If it be *agreed* that A shall pay 10*l.* to B for his goods, this amounts to a covenant by B to deliver his goods, because *agreed* is the word of both. 1 Saund. 322. 1 Sid. 423. T. Raym. 183. 2 Com. Dig. 559.

There was much absurdity in the law before the statute* of set-off was enacted. Our defalcation act, 4 Annæ, in 1705 reaches much further. The act of 3 Geo. 2, 1729, § 10, pa. 165, is almost copied *verbatim* from the English statute of the preceding year. Under the former act, "Any bond, bill, receipt, account, or bargain," may be given in evidence, and if it appear that the plaintiff is overpaid, the jury shall certify how much the plaintiff is indebted, and the debt shall become a debt of record. If the defendants, therefore, can show any matter which would form a good defense *ex æquo et bono*, it ought to avail them. The want of a Court of Equity amongst us has more strongly induced this liberality of practise. Want of consideration, or mistake, may be given in evidence to defeat a bond, Dall. 17; and the jury may presume anything to be paid, which of right ought not to be paid. Ib. 260. The obligations in the contract are mutual and dependent; the whole shall be construed as one agreement. Pow. on Cont. 410. Here the defendants have been obstructed in the full enjoyment of the mill and privileges conveyed to them, and so far as they have sustained damages by this breach of contract, the consideration of the bond has failed, and they ought to receive compensation therefor. The plaintiffs have received full notice of this part of the defense, and no injury can result to them from going into the inquiry in the present suit.

By the Court. The question before us is not whether the defendants may sustain a suit against the plaintiffs for the supposed injury done to them in swelling the water below; but whether the testimony offered is sustainable in the present action? That part of the defense which was grounded on the suit brought by Waggoner, seems to be abandoned.

The motion of the defendants can only be supported under the defalcation act, or the liberality of the practise of the Courts of this state, under the general issue of payment. The act of 1705 could never have intended that damages under a covenant,

* Stat. 2, Geo. 2, c. 22, made perpetual by 3 Geo. 2, c. 24, and the set-off is thereby extended to debts of a different nature.

sounding merely in tort, could be defaulted. Other kinds of "bargains," as for payment of money, &c., must have been within the intention of the legislature. At the same time, we think that our defalcation act of 4 Ann. has much more extensive words than the British statute; there may be clearly cases of set-off amongst us, for which *indebitatus assumpsit* would not lie, according to the resolutions in England. Cowp. 57. But this ground has not been much relied on by the counsel.

It remains then to be considered, whether the evidence can be warranted by the practise of our Courts. It is not within the words or meaning of the 39th rule, regulating the practise of the Supreme Court, nor do we recollect any case that has ever gone so far as is now attempted. The consequence of our admitting such evidence would be the blending of the most *discordant* subjects; matters arising *ex contractu* and *ex delicto*, and therefore we think that the evidence cannot be received; but if the counsel should think that we are mistaken, application may be made to the Court in blank.

And per *Yeates, J.* In the case of Frederick Sweitzer *vs.* John Garber, in Cumberland, May Assizes, 1788, I was of counsel with the defendant. The action was brought on a bond, the consideration of lands sold by the plaintiff to the defendant. We offered to show under the general issue, that the defendant was interrupted in the possession by one Mohler, to whom the premises had been demised by the plaintiff; but the chief justice overruled the evidence. That case was analogous to the present.

The jury found accordingly.

Messrs. Thomas and T. Ross, *pro quer.*

Messrs. Ingersol, Sitgreaves, and J. Ross, *pro def.*

JOHN WALKER *vs.* PETER BUTZ.

ANONYMOUS.

Large damages given in an action for obstructing a water course, to compel the defendant to do justice.

Lis pendens is a sufficient notice to a purchaser.

ACTION on the case, for obstructing a water course, running into the plaintiff's meadow.

The plaintiff fully made out his case. Articles of agreement were made in 1751, between John Walker, the father of the plaintiff, and Thomas Wilson, who sold the premises to the defendant, whereby Walker exchanged 7 acres of land with Wilson, for 10½ acres of his land, to accommodate the latter with a good mill-seat, and Wilson covenanted that Walker, his heirs and as-

signs, should have the free privilege of using the spare water from his mill, provided the same did not prove hurtful thereto, and in case the privilege should injure his mill, that he should receive immediate compensation for the same, according to the award of neighbors, to be appointed for that purpose.

The mill was erected, and old Walker in his lifetime carried the water from the forebay into a ditch leading through Wilson's lands to his meadow, and highly improved the same, without doing any injury whatever to the mill. In 1792, the defendant purchased the mill and land from Wilson, with full notice of the agreement, but his conveyance from Wilson on the 15th April, 1793, contained no exceptions to reservations. Shortly afterwards the defendant endeavored to purchase the plaintiff's meadow ground, which received the water from the mill. But failing herein he maliciously nailed up the floodgate which introduced the water to the ditch, and thereby greatly impoverished the plaintiff's meadow, without doing himself any advantage. Pending this suit, the defendant sold the mill and lands to one Weaver.

The plaintiff's counsel did not go for damages, though their client suffered considerably. By a written engagement filed in Court, they agreed to release the damages to be found by the jury, on the water right being secured to the plaintiff according to the ancient agreement, in such manner as should be agreed to by the counsel on both sides. The damages laid in the declaration were 500*l*.

The jury, under the directions of the Court, found 490*l*. damages, and costs, against the defendant. And the Court ruled, that *lis pendens* was a sufficient notice to Weaver, the purchaser. Vid. 2 Cha. Ca. 116. 2 Atky. 174.

See the case of Clyde *vs.* Clyde, where exemplary damages were given in *assumpsit*, in a like case.

Messrs. Sitgreaves and Thomas, *pro quer.*

Messrs. Ingersol and Clymer, *pro def.*

AT NISI PRIUS, AT READING,
OCTOBER ASSIZES, 1795.

Coram YEATES AND SMITH, JUSTICES.

TIMOTHY PEACEABLE, lessee of BENJAMIN BIOREN, *vs.* JACOB
KEEP.

Release to a baron and feme, to enable her to give testimony in the absence of the baron, is good.

The lessee of the plaintiff claimed under a conveyance from John Burge and Mary, his wife (his mother), and Mary Bioren and John Bioren (his brother and sister), wherein the words "do grant, bargain, sell, alien, release," &c., were used, and not restricted by any subsequent words.

Mary Burge, in the absence of her husband, was offered as a witness, and a release was executed and delivered to her at the bar by her son, the lessor of the plaintiff, releasing all claims against her husband and herself, under the implied covenant of warranty in the deed.

She was at first excepted to by the defendant's counsel, because her husband was not present to accept the release. But on the case of Fowler's lessee *vs.* Welford (Dong. 134), being cited, the objection was waived, and the witness was sworn.

Verdict for the defendant.

Messrs Ingersol and Read, *pro quer.*

Messrs. Clymer and M. Biddle, *pro def.*

JOHN POTT, JUNIOR, *vs.* JACOB LESHER.

In an action for use and occupation, a contract, express or implied, must be proved.

THE plaintiff declared on two counts. 1st, *indebitatus assumpsit* for 500*l.* for the use and occupation of one furnace, &c., in East District township. 2d, On a *quantum valebant*.

The facts which appeared in evidence, were as follow :

John Leshar being seized of the premises, and a judgment to a considerable amount being recovered against him, on the 10th June, 1784, entered into articles of agreement with the plaintiff and Jacob Morgan, jun., his sons-in-law and the defendant, his son, whereby the said John Leshar sold, granted, and conveyed to the said John Pott, Jacob Morgan, and Jacob Leshar, and

their heirs, *as tenants in common*, all his lands and real estate (excepting fifty acres of woodland), and covenanted to make a formal conveyance of one undivided third part to each of them, in three months. The consideration therein expressed was 5s., and the grantees respectively covenanted for themselves, separately, and not jointly, that each would pay off one third part of the said judgment, and indemnify the said John Leshar against all moneys, costs, and charges thereon. These articles were executed by John Leshar and Jacob Morgan, jun., but *not by the other parties*. The plaintiff, however, paid 330*l.* 5s. on account of his father-in-law's debt, but a much larger sum remained due of his proportional part of the judgment. The defendant paid no part thereof, and on the 8th June, 1786, in consideration of 5s., he reconveyed to his father his undivided right. On the 1st January, 1786, the plaintiff, as a *joint owner*, with the approbation of John Leshar, rented his share of the furnace and lands to Jacob Bower, for three years, under the annual rent of twenty tons of pig iron, but on the plaintiff not complying with his covenant, old Leshar directed the tenant to pay him no more rent. Two valuable tracts of land, of the said John Leshar, were afterwards sold by the sheriff to discharge the judgment, and a family controversy arising thereon, the said John Leshar conveyed the lands which he had originally intended for the plaintiff, to John Teysscher, another son-in-law.

No evidence was given to show in what manner the defendant came into possession of the furnace and lands; but it was admitted that he held them for some time. He contended that he never came in under the plaintiff's permission, but by his father's order, after the plaintiff's breach of covenant.

The plaintiff urged that the possession of one tenant in common was the possession of the other. Espin. 2d edit. 434.

The law will presume that the defendant came in under the article, and held for himself and his co-tenants, and will therefore subject him to account for their shares of the profits. His uninterrupted enjoyment of the premises is evidence that he held by permission of the other partners. They cited *Birch vs. Wright*, 1 Term Rep. 378.

The defendant insisted that in cases of this nature it must be expressly proved that the defendant came into possession under the plaintiff, and held by his permission. The action is novel in Pennsylvania. The stat. of 11 Geo. 2, c. 19, gave the remedy in England, but the suit must be founded on a promise. Espin.

20. And this is the reason why *nil habuit in tenementis* is no good plea to an action for use and occupation. Ib. 165; 1 Wils. 314. Here the plaintiff has failed in his proof, and must be nonsuited.

By the Court. We feel no inclination to turn the plaintiff round to another suit, if justice could be administered in the present action, agreeably to the established rules of law; we, however, feel ourselves bound to adhere to the settled boundaries of actions. We should, in an action for use and occupation, under the evidence adduced, try an ejectment, the defendant holding adverse to the plaintiff's title, and not under his license. The suit is brought for use and occupation, under the defendant's permission; and the *allegata* and *probata* must agree. Independent of the authorities cited, why should these matters be laid in the declaration, if it was not necessary that they should be proved? It was formerly held, Hutt. 24; Cro. El. 242, that *case* would not lie for rent. But the law is now settled to be otherwise where there is an express promise. 3 Mod. 73, 239; Cro. Car. 414; 1 Lev. 204; 2 Show. 135.

To aid the interests of landlords, the statute of 11 Geo. 2 c. 19, was enacted in England, which allowed a degree of evidence not admissible before, in suits similar to the present. Such actions have also been brought in Pennsylvania. But a promise either express or implied must be shown, even since the statute, and proof given that the defendant came into possession by the permission of the plaintiff; or at least such strong circumstances must be shown as would preclude the idea of an adversary claim. The decision in the case of *Birch vs. Wright*, went on the ground that the defendant was originally tenant from year to year to Mr. Bowes; and that under the operations of the indenture and fine levied by him and lady Strathmore, his wife, the plaintiff became the *rightful landlord* until the time of the ejectment brought. And Buller, J., lays it down (1 Term Rep. 387) that the action for use and occupation is founded on *contract*; and unless there were a contract, either express or implied, the action could not be maintained.

Here the proof to support this species of action is materially defective. But the plaintiff is not without remedy. If he is equitably entitled, under the agreement of 10th June, 1784, and has substantially performed his part of the covenants, he can support ejectment for the undivided third part of the premises; and succeeding herein, he may bring trespass for the meane profits. But in this family dispute we recommend a reference to

neighbors. This not being agreed to, the plaintiff suffered a nonsuit.

Messrs. Clymer and M. Biddle, *pro quer.*

Messrs. Read and Spayd, *pro def.*

AT NISI PRIUS AT SUNBURY,
OCTOBER ASSIZES, 1795.

Coram YEATES AND SMITH, JUSTICES.

RODERICK RANDOM, lessee of MICHAEL WHEELAND, *vs.* PETER
SWARTZ, SENIOR, and PETER SWARTZ, JUNIOR.

To make an instrument in the nature of a mortgage a conditional sale, the intention of the parties at the time of contracting must be clearly proved, or necessarily implied from the circumstances attending.

EJECTMENT, for 100 acres of land in White Deer township.

The case on the evidence appeared to be this: On the 3d April, 1769, Michael Wheeland, the father of the lessor of the plaintiff, entered in the land office a precise application for the lands in question, which was successful. He entered into possession thereof with his family, improved the same, and died thereon intestate, in 1771, leaving a widow named Magdalena, (who intermarried with Peter Swartz, senior, in December, 1772), and nine children, of whom the lessor of the plaintiff was the eldest son. The widow administered, and the inventory was filed on the 8th January, 1773. Swartz and his wife settled their administration account on the 8th February, 1774, whereby there appeared a balance of 198*l.* 1*s.* 4*d.* in the hands of the administrators, of which the widow's share was 66*l.* 0*s.* 4½*d.* and the eldest son's 26*l.* 8*s.* 2*d.* On the 20th April, 1774, the latter executed a deed to Swartz, his step-father, in fee simple in which there was the following clause, "Provided, if I, the said Michael Wheeland, my executors, administrators, or assigns, or any of us, do and shall well and truly pay or cause to be paid unto the said Peter Swartz, his executors, administrators, or assigns, the above sum of 50*l.* for the redemption of the bargained premises, on or before the 1st May, 1776, then the present bill of sale to be void. But if default shall be made in the

payment of the said 50*l*. then it shall remain in full force and virtue." The consideration expressed in the deed was 50*l*., and the same was recorded on the 8th June, 1774. On the 16th July, 1785, Swartz obtained a patent for the lands (which recited a release from six of the children to him, on the 21st November, 1784), containing 306 acres, 60 perches and allowance.

The lessor of the plaintiff, in 1791, tendered to Swartz 56*l*. and a re-conveyance of the premises, which he required him to execute. This was refused.

Some proof was given at the trial, that the lessor of the plaintiff was a weak man, and that the lands in question were at least worth 40*s*. per acre in 1774. The defendants made additional improvements on the lands after 1774.

Two questions were made by the defendant's counsel. 1. Whether the instrument, on which their claim was founded, was a bill of sale or a mortgage. 2. If the former, whether there was such an inadequacy of price, as that it would be subjected to be vacated.

They urged that neither a Court of Equity nor of law could altar men's contracts. 2 Bl. Com. 150. The substantial intent of the parties in deeds, is to be regarded. 1 Atky. 8. Here it is contended that the plain meaning of the parties was, that the deed should be considered as an absolute conveyance, if the money was not paid on the 1st May, 1776. No interest being expressed therein to be payable, is an additional circumstance, demonstrative of the parties' intentions.

Where, by the express terms of a mortgage, it is agreed that if the money be not paid within a certain time the estate shall be irredeemable, that is considered in the nature of a conditional purchase, and no redemption ought to be allowed, especially after a lapse of many years. 4 Bro. Parl. Ca. 142. So where the mortgage money is stipulated to be paid in one entire sum, and the mortgagee and those claiming under him continued in possession for near 100 years, without foreclosing, a bill brought to redeem shall be dismissed with costs. *Ib.* 369. Where there is a clause or provision in the conveyance, for the vendor to repurchase, the time limited for that purpose ought to be precisely observed. 1 Vern. 268. Release of an equity of redemption, and a note taken at the time, that on the releasor repaying within a year the sum given for the lands, there shall be a re-conveyance, there shall be no relief after the expiration of the time for several years. 2 Equ. Ca. Abr. 595, pl. 6. Equity will not enlarge the time for mortgagor to redeem after six years acquiescence under a foreclosure by his own consent, especially

if there have been any improvements on the estate. 15 Vin. Ab. 469, pl. 13. There shall be no redemption after long possession, settlements made, and an estate improved. Ib. pl. 14. A mortgage is a pawn or pledge of lands for moneys borrowed. 1 Co. 332. And though it be forfeited at common law, equity will consider the real value of the tenements, compared with the sum borrowed. 2 Bl. Com. 159. In the present instance, Swartz was put into immediate possession, and it would be highly improper to judge of the value of the lands from the present rate at which such lands would sell. The very rapid rise in lands is a circumstance which no one could foresee, and could not possibly have been in the contemplation of the parties. In this light the present contract is analogous to the case of *stock*. On a mortgage of lands a bill of foreclosure should be brought, but not on a mortgage of stock. 2 Atky. 303. So a rent charge shall not be redeemable at a great distance of time, money having depreciated. Ib. 497. 1 Wms. 271. If there is a transaction between parties of the same family, and there appears an intent to benefit the lender, the Court will consider it in a double aspect, and, in a certain event, turn a mortgage into a purchase, contrary to the general rule. Powel on Mortg. 30. It was also contended that this case much resembled a case determined at *Nisi Prius*, in Cumberland county, between the lessee of Walter Bell *vs.* Leonard Fisher,* November assizes, 1790, where such an instrument was ruled to be an absolute conveyance.

* The circumstances of that case, as they appeared on the trial, were these: Joseph Hines, having purchased an improvement made on certain lands in East Pennobscot township, took a location for them on the 8th October, 1766. On the 23d May, 1767, being about to make a journey to New England, and having immediate occasion for money to bear his expenses, Hines conveyed the lands to Robert Campbell, in consideration of 70*l.*, as the deed purported, but the real purchase money, as proved by witnesses, was but 20*l.*, which was then the real value of the land. And Campbell, on the same day, executed an instrument to Hines, for securing the payment of the 20*l.*, with a clause therein that "If the money was not paid on the 25th July following, that Hines should make sale of the lands to raise the same." Campbell paid no part of the money, nor entered into the possession. On the 21st May, 1770, Hines sold in pursuance of his power, part of the lands to the defendant (the same being woodland), for 20*l.* and he took possession, cleared 40 acres, and otherwise improved the same for 13 years, without notice. Campbell, on the 30th March, 1775, in consideration of 20*l.* conveyed to Hugh Moore, to indemnify him as his security; and he conveyed to Walter Bell, on the 20th June, 1782, who in the succeeding year, having tendered 30*l.* *ds.*, the principal and interest, to the defendant, brought his ejectment.

It was ruled by M^r Kean, C. J., that the deed to Hines should be considered as an absolute conveyance, granting him full power to sell, on Campbell not complying with his stipulations which appeared to be the real inducement to the first sale.

Yeates, of counsel for the plaintiff.

On the second point, they insisted that there was no great inadequacy of price; and equity will not relieve where one enters into a hard bargain, with his eyes open. 2 Atky. 251. 2 Pow. on Contra. 144.

The plaintiff contended that the deed in question came fully within the legal idea of a mortgage; lands having been taken as a security on a loan of money. Hargr. Co. Lit. 205 a (note). The want of a covenant therein for the re-payment of the money will make no difference, since such defect is no bar to a redemption. 2 Atky. 496. No unreasonable length of time has incurred, when depreciated currency which took place during the war is taken into consideration; and as to interest not being expressed in the instrument, the share of the profits of the lands which belonged to the lessor of the plaintiff was more than an equivalent for the loan of the money, as a forbearance. The improvements made by Swartz will give him no equity, as they were made under a full knowledge of the plaintiff's claim. A articles to buy land, and pays part of the purchase money; afterwards he enters into several orders of Court to pay the residue by such a day, and in default thereof to give up the articles, and lose what he had before paid. Equity will relieve, though these orders have not been complied with. 2 Wms. 66.

By the Court. The only question before us is, whether the deed from Wheeland to Swartz is to be considered as a mortgage, or as a defeasible sale, subject to re-purchase, within the *limited period* of 2 years and 11 days?

There are certainly such words in it as are commonly found in mortgages. The reservation of the equity of redemption is couched in terms sufficiently apt and technical; and it must be deemed a mortgage, if it was not made in contemplation of an eventual arrangement of property. Powel on Mortg. 18. To make it a conditional sale, Ib. 50, the intention of the parties at the time of contracting must be clearly proved, or necessarily implied from the circumstances attending it.

Of this, it will be admitted, there is no direct proof. What, then, are the circumstances from which this necessary implication is to arise? On examination they will be found to be very different from those which appeared in Bell's lessee *vs* Fisher, stated by the defendant's counsel.

Wheeland is said to be a *weak* man, by one witness of credit. His step-father, on the 8th, February, 1774, owed him 26*l.* 8*s.* 2*d.*, his distributive share of the personal estate of his father, and it is not pretended that he has paid it. So that on the loan of

50*l.* in April following, Swartz really accommodated him with only 23*l.* 11*s.* 10*d.* Would this latter sum be an equivalent for 43 acres of land, to which Wheeland was then immediately entitled, and to 21½ acres in reversion after his mother's death, when those lands were actually worth 40*s.* per acre? It was not one-fourth part of their honest value, and though mere inadequacy of price is not a ground for a Court of Equity to vacate an agreement, yet it will show the true intention of the parties; and in some cases will show a command over a necessitous man which may amount to a fraud. 2 Bro. Cha. Rep. 175. 1 Bro. Cha. Rep. 9, 22.

No stress can be laid on Swartz having the possession; because he received it on his intermarriage with old Wheeland's widow, during the minority of the children; and it is therefore distinguishable from mortgages in common cases, where the mortgager usually retains the possession. Nor can any reliance be placed on the instrument containing no covenant for payment of the sum borrowed, or stipulation for the payment of interest, as has been properly observed by the plaintiff's counsel.

But it has been said there has been great delay in the payment of the money. Swartz cannot complain of not being paid in depreciated paper during the war. And we have a law, passed 12th March, 1783, which suspends the act for limitation of actions between the 1st January, 1776, and 21st June, 1784, a period of nearly eight and a half years. So that adding this interval of the time when the money was to be paid, there is about seven years delay of payment. Surely this length of time cannot be said to be unreasonable; but if Swartz had wanted the money and not the land, he might have compelled the payment at an early day, by suing out his *scire facias*. Even in England, the redemption of a mortgage will be decreed within 20 years after possession. 2 Vent. 340. 1 Equ. Ca. Ab. 314. 4 Burr. 1963.

The improvements made by Swartz cannot convey an equity, as he perfectly knew the circumstances under which his deed was obtained; and besides he must be supposed to have an eye to his own convenience therein, as he was entitled to one-third of the lands in right of his wife, during her life, and to six-tenths of the whole, which he purchased from the brothers and sisters of the lessors of the plaintiff.

The patent, so far from operating in the defendant's favor, makes against him. For there appears to be a concealment of the lessor being one of them, as it recites a release from six of the children only. He appears to have studiously avoided showing his deed in the land office.

Upon the whole, so far from the circumstances evincing that the deed was intended as an absolute conveyance, the contrary appears from them ; and we see no reason for departing from the old maxim in equity, that an estate cannot be a mortgage at one time and an absolute purchase at another. 1 Vern. 8, 33, 190, 488. 1 Wms. 268.

Verdict *pro quer.* for two undivided tenth parts of the lands.
Messrs. D. Smith and Walker, *pro quer.*
Messrs. Hall and D. Levy, *pro def.*

AT NISI PRIUS AT HARRISBURGH,
OCTOBER ASSIZES, 1795.

Coram YEATES AND SMITH, JUSTICES.

JACOB BOLTZ and ANTHONY KELKER, executors of THOMAS MAT-
TER, *vs.* FREDERICK BULLMAN.

A lapse of eighteen years and a half is not sufficient to found a presumption of payment of a bond, and circumstances may repel that presumption.

The declaration of a mere stranger that a bond was paid, shall not be received in evidence.

DEBT, on obligation dated 1st August, 1764, conditioned for the payment of 20*l.* with interest in one year. Plea, payment, with leave to give the special matter in evidence.

The defendant relied on the legal presumption of payment, after so great a lapse of time.

The suit was brought in the Common Pleas, to September term, 1792; 5*l.* 2*s.* 10*d.* was indorsed on the bond as paid 3d June, 1772, and two witnesses swore, they believe the indorsement to be in the hand writing of the defendant; but another witness who had the bond in his possession for some time, swore that the indorsement was not on the bond in 1776, but must have been made since.

The plaintiffs proved that the money had been demanded from the defendant in 1792, before the commencement of the suit, and that the latter said he was willing to pay what was due on the bond, but that he paid John Miller 10*l.* thereon in

1771.. He appointed a subsequent day for settlement, but did not keep his appointment.

To account for the length of time, they showed that the testator, by his will dated 3d March, 1770, had devised to his widow certain bonds, which *had been assigned* to her; and that after his death she possessed herself of this obligation, against the consent of at least one of the executors (Boltz), and held it until the death of the said John Miller, her second husband, in 1776, when she delivered it up, and died in 1778, leaving considerable property.

On the other hand, the declarations of Kelker, one of the executors (the brother-in-law of the defendant), on the morning of the trial, were given in evidence, that the widow of Matter had received this bond with the others, from him, and that some part of the bond had been paid by a note, but not to him, nor did he see any money paid.

One Melchior Ditzler was offered as a witness by the defendant, to prove the declaration of the testator's widow, that the bond had been discharged; but it was objected to, and the testimony overruled by the Court, because she did not appear to have been the agent of the executors, nor was she interested in the bond under the testator's will. She could only be considered as a mere stranger, acting without authority, and therefore her declarations could not be received.

The Court, in their charge to the jury, said, that as to the proof of *actual* payment, it must be submitted wholly to them. The declarations of Kelker, in derogation of his trust, and in favor of his brother-in-law, at that late day, were very suspicious. If he was sensible there was no money due on the bond, he was bound to stop the suit, and then his conduct would be fairly examinable in the Orphans' Court, at the instance of the legatees. If the defendant had paid money to John Miller by mistake, his estate was answerable for such payment; and if to the widow, her separate estate could be recurred to.

On the ground of presumptive payment, arising from length of time, there remained about eighteen and a half years to be accounted for. The bond was payable on the 1st August, 1765, and from thence to 1st January, 1776, was ten years and five months. Take off the interval from the 1st January, 1776, to the 21st June, 1784, under the act of assembly (passed 12th March, 1783), and then recur to 1784, and count to 1792, the time of commencing the suit, the period will be about eight years and one month, making in the whole eighteen and a half years. The law for limitation of actions, does not include

bonds and specialties, but the principle which gave rise to that act, extending also to them, it has been determined that where the limitation act does not apply, that period shall not be computed, in judging of the legal presumption of payment.

In the case of *Oswald's executors vs. Legh*, 1 Term. Rep. 271 (the latest case in the books on this point), nineteen and a half years of *itself merely* were held insufficient to form the presumption; and Buller, justice in that case, said that "Even with regard to the rule of twenty years, where no demand had been made during that time, that is only a circumstance for the jury to found a presumption upon, and is in itself no legal bar."

But here evidence has been given to repel the presumption. 1. The possession of the bond has been in the widow, since the testator's death. 2. The defendant has acknowledged a balance to be due on it. And 3. The defendant has indorsed on it the payment of interest in 1772, all of which tend to weaken, if not wholly to destroy, the legal presumption.

Verdict for plaintiff for 40*l.*, debt, 12*l.* 6*s.* 10*d.*, damages, and six pence costs.

Mr. Fisher, *pro quer.*

Mr. Clymer, *pro def.*

PETER LEGAUX *vs.* GEORGE FEASOR.

Where the injury is immediate, trespass *vi and armis* lies. But where it is consequential or collateral, case lies.

CASE, for unlawfully enticing and procuring his indented servant, Frederick Lewis Jockey, to depart from and leave the service of the plaintiff, his master. *Non Cul.* and issue.

It appeared on the evidence that Jockey was regularly bound as a servant, to the plaintiff, in September, 1785, in consideration of 26*l.* 6*s.* 6*d.*, to serve him for 14 years and three months, he being then about six years and a half old.

About four years afterward, the defendant called at the plaintiff's house, at Spring Mills, in Montgomery county, and endeavored to persuade the lad, in the absence of his master, to leave his master, telling him that his father, in a back county, had sent for him. The boy refused, but at length, partly by persuasion and partly by force (as the boy swore), and being joined by two persons in the plaintiff's family, who were at variance with him, he went with him, and they pursued their journey the whole of the night following. The defendant, according to the lad's oath,

promised him one of his plantations if he would accompany him, and assured him that his master could as soon catch a rabbit in the forest as take him again.

In about one month after Jockey came with the defendant into Dauphin county, he broke his leg in hunting the defendant's horses early in the morning, and lay in his bed six weeks, without medical assistance. The bones of the leg afterwards becoming carious, the plaintiff was put to considerable expense by his application to several surgeons to cure the fracture, but without success.

In November sessions, 1791, the defendant was indicted (with another, who was not taken on the process) for an assault and battery, and false imprisonment of Jockey, tried, convicted and fined 5*l*.

The defendant attempted to prove that the plaintiff had suborned his servant to swear falsely, with a bribe of 50*l*. For this purpose he produced two witnesses, (one the father of the servant); but their stories were so disjointed, and so far outstepped the modesty of credibility, that they were waived by his counsel, who rested his case on a point of law that the action had been misconceived, and that trespass *vi et armis*, and not case, was the proper remedy. They cited 2 Espin. 364. 2 Burr. 1114. 1 Stra. 635. 2 Ld. Raym. 1402. 3 Salk. 191. 3 Burr. 1306.

E contra was cited 2 Ld. Raym. 1116, 1117.

The Court told the jury that the boundaries of actions must be kept up, otherwise confusion would ensue. This well known distinction has been settled between actions of trespass *vi et armis*, and on the case: where the injury is the immediate consequence of an unlawful act, trespass lies; but where it is consequential or collateral, case is the proper remedy. If it appeared that the defendant, by unequivocal direct force, took away the servant, a recovery could not be had in the present form of action; and however the occasion might be regretted, the Court could not mould this suit into an action of trespass.

The question is, whether this violence plainly appears. The defendant tried his efforts to entice the child away, and used the lure of his visiting his father, getting one of his plantations, and being safe out of his master's reach. No great force could be necessary to be used by these grown persons over a boy 10½ years old. Taking human nature as we find it, it is highly probable that the boy, though desirous of seeing his father, wishes it now to be believed that he left his master's service with great reluctance.

What the jury on the criminal prosecution did, can have no weight on the present controversy. The Court will not undertake to say that the former jury erred in their verdict; but they are bound to assert that the present jury must judge for themselves on all the evidence they have heard; they will use due caution before they determine that absolute and direct force had been used by the defendant, which will make the plaintiff's case remediless, on account of the law for limitation of actions; yet, if the evidence clearly induces this opinion, they are bound to say so, and in that case to find for the defendant. Should they think that the defendant has been guilty of unlawfully enticing and procuring Jockey to depart from his master's service they will probably feel themselves bound to assess exemplary damages, taking into consideration the circumstances of the case.

[After the jury left the bar, the Court committed the father of the servant for willful and corrupt perjury, in the testimony he gave at the trial; and issued a bench warrant against the other witness for the like offense, but he escaped from justice for the present.]

Verdict for the plaintiff for 300*l.* damages, and six pence costs.

Messrs. Read, O. Smith, and Hall, *pro quer.*

Messrs. Duncan and Olymer, *pro def.*

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11. Commissioners, under the act of 16th September, 1785, may assign debts due to the bankrupt, but not *torts*. *Shoemaker et al. vs. Keely.* 245
12. The act of assembly vesting Isaac Austin with a messuage, &c., passed 6th August, 1784, resolved to be unconstitutional. *Austin vs. University of Pennsylvania.* 260
13. The officers of the state navy, under the resolves of the house of assembly of 13th and 24th March, 1779, are chargeable for clothing delivered to them in that year, only at the rate of depreciation at the time it was delivered, according to the prices before the war. *Roach vs. Rempublican.* 282
14. Such officers who were honorably discharged, having accepted the commutation, are not entitled, under the resolve of 25th March, 1784, to the previous arrears of half-pay. 28
15. The 15th section of the act of 8th April, 1785, that every survey made by a deputy surveyor out of his proper district, shall be void, relates solely to the lands purchased at Fort M'Intosh. *Wright's lessee vs. Wells.* 286
16. A location, whereon no survey has been made, is within the meaning of the limitation act of 28th March, 1785. *Irwin's lessee vs. Nichols et al.* 293
17. The act of 1705, "For the better settling of intestates' estates," only regulates the descent of lands among the children, where the father is seized thereof, and might dispose of them by deed or will. *Sauder's lessee vs. Morningstar.* 313
18. In ejectment for lands on Pine creek, under the act of assembly of 21st December, 1784, it is indispensably necessary to show in evidence that the lessor of plaintiff had paid, or tendered the consideration thereof to the receiver general, on or before the 1st November, 1785. *Cook's lessee vs. Eppele.* 324
19. A citizen of South Carolina is not within the saving of the limitation act of 27th March, 1713. *Ward vs. Hallam.* 329
20. After the supplement to the attainder law of 29th March, 1779, a claim, which was not for the payment of money, or satisfaction out of the estate of the attainted traitor, could not properly be brought before the Supreme Court, to be heard in a summary way by the judges. *Evans's lessee vs. Davis.* 338
21. The presumption of payment of a bond, arising from length of time, shall be suspended between 1st January, 1776, and 21st June, 1784, under the law passed 12th March, 1783. *Penrose et al., executors, vs. King.* 344
22. The Court will not appoint auditors under the depreciation act of 3d April, 1781, unless it appears that the contract arose between 1st January, 1777, and 1st March, 1781. *Robb vs. McEwen.* 353
23. Inquisition, or writs in nature of writs *ad quod damnum*, issued under the act of assembly of 29th September, 1791, will not be set aside, because the canal company had not offered to agree with the owners of the land, where it appears they combined in a body against the work itself.—attended the striking of the jury,—showed their lines to the jury, and made preparations for their coming. *Schuykill and Susquehanna Navigation vs. Diffebach et al.* 367
24. Under the abolition act of 1st March, 1780, free negroes, or mulattoes, can be bound in this state as servants only, until twenty-one years of age, but those who have been bound in other states, and brought into this state, may be compelled to serve until twenty-eight years, according to the terms of their indentures. *Respublica vs. Gaoler of Philadelphia.* 368
25. The act of 12th Wm. 3d (in 1700), does not make lands more pointedly liable for the debts of deceased persons, than personal estate was previous thereto. *Speare vs. Hannum.* 380
26. A pre-emption warrant, granted to the plaintiff in ejectment, under the act of 21st December, 1784, though he has not been on the Pine Creek lands since the commencement of the late war, shall prevail against a defendant who has not taken out his warrant until after 1st November, 1785. *McConnell's lessee vs. Porter.* 405
27. In debt under the act of February 14th, 1729-30, by original process, against a clergyman, for marrying a minor without the consent of his parent, the plaintiff is entitled to costs. *Norris vs. Pilmore.* 405
28. Under the act of 22d April, 1794, "For the better preventing of crimes," in order to convict on the first clause of the 8th section, there need only be a general intent to maim and disfigure; but on the second clause, there must be a particular intent to put out the eye. *Respublica vs. Landcake et al.* 415
— What is the legal sense of the word "Malice." 415
— The malice and lying in wait need not be expressly proved, but may be collected from all the circumstances of the case. 415
29. All possible, contingent titles in lands, accompanied with a real interest, may be seized in execution, and sold by the sheriff, under the act of 4th Ann. 1705. *Humphrey's lessee vs. Humphreys.* 427
— It is not necessary to hold inquisitions on estates for life, or reversions or remainders previous to a sale by the sheriff, under the act of 4th Ann. 427

30. Under the act of 10th April, 1793, incorporating the Delaware and Schuylkill canal company, the jury shall judge whether a bridge or ford be necessary; but cannot find that neither are necessary. *Delaware and Schuylkill canal navigation vs. Miffin et al.* 430
31. Roads, private or public, laid out, after the passing of this act, across the canal, shall not be bridged by the company. *ib.*
32. *Quærs.* Whether an appeal will lie from the general verdict of a jury in the State Court of Admiralty, in the case of a prize, where the contest is between citizens of the United States only, under the act of assembly of September 9th, 1778. *Ross's executors vs. Rittenhouse.* 443
33. The 7th section of the act explaining the act for the gradual abolition of slavery, passed 29th March, 1788, extends not to the case of a sojourner forcibly carrying off his slave. *Respublica vs. Richards.* 480
34. The trustees of the university are entitled to compensation for lands, or ground rents, reserved to them, or bought by their agents, in case of eviction, under the 9th section of the act of 29th March, 1778. *Trustees of the University, &c., vs. Rempublicam.* 485
35. Persons not entitled to the pre-emption of Indian lands, under the act of 21st December, 1784, who did not occupy the same after the commencement of the war. *Hughes' lessee vs. Dougherty.* 497
36. But one who occupied them until the war broke out, and then enlisted as a soldier, is within the act. *Sweeney's lessee vs. Toner.* 499
37. Juries cannot reduce partial payments under the depreciation act of 3d April, 1781. *Miller vs. Leonhard et al.* 870

ACTS OF PARLIAMENT, STATUTES.

1. Neither the English statute of 21st Jac. 1, c. 16, nor the act of assembly of 27th March, 1713, prescribes the period when a suit on a bond shall be barred; but on the principle on which those acts were passed, the judges have presumed a payment after a certain length of time. *Penrose et al. vs. King.* 346
2. Statutes, formerly construed liberally, on a change of circumstances to receive a strict construction. *Respublica vs. Devore.* 501

ADMINISTRATORS AND EXECUTORS.

1. Justices of the peace have always exercised jurisdiction in the case of executors and administrators, defendants. *Oakes vs. Robinson, executor.* 250
2. Where two or more executors have sold lands openly and fairly, and they have been bought in by a stranger for one of them, such sale is not void necessarily; it is not merely of itself a fraud to vacate the contract, but matter of evidence to be judged of. *Eichelberger's lessee vs. Barnitz et al.* 307
3. If administrators sell lands by order of Orphans' Court, misapply the money, and become insolvent, such lands are not subject to the debts of the deceased. *Spear vs. Hanum.* 380
4. So of executors selling lands, under proper powers in a will. *ib.*
5. Testator directs lands to be sold, and the moneys distributed, but appoints no one to sell; a sale by the surviving executor is good. *Lloyd's lessee vs. Taylor.* 423

ADMIRALTY.

1. Admiralty has no jurisdiction in case of legal wreck. *Le Case vs. Mallet.* 55
2. Admiralty may take a stipulation to perform a decree, and a writing, though void as a stipulation, may be good as a contract, on which, the sum being certain, debt will lie. *ib.*
3. Agent of seamen, to receive their prize money, may sue in his own name; and where the action cannot possibly draw into controversy the question of "Prize or no prize," it may be brought in a Court of Common Law. *Henderson vs. Clarkson.* 148
4. Cases of prize and their consequences are exclusively of admiralty jurisdiction. *Ross's executors vs. Rittenhouse.* 443
5. *Quærs.* Whether an appeal will lie from the general verdict of a jury in the State Court of Admiralty, in the case of a prize where the contest is between citizens of the United States only, under the act of assembly of 9th September, 1778. *ib.*

ADULTERY.

1. Adultery, under the act of assembly of 1705, can only be committed by married persons. *Respublica vs. Roberts.* 6
2. Under an indictment for adultery, the defendant may be convicted of fornication. *ib.*

AGENT.

1. Attorney, agent, or factor, bidding for another, may prove his own power. *Miller vs. Stayman.* 24
2. Agent, when plaintiff, cannot be a witness. *Field et al. vs. Biddle.* 134
3. Agent of seamen, to receive their prize money, may sue in his own name. *Henderson vs. Clarkson.* 148
4. The power of an agent to rent lands must be proved by other testimony than that of the agent; if there be a written power, it should be produced; if it is burnt, or lost, the contents of it should be proved. *Meredith's lessee vs. Macosa.* 200

5. Neither shall the agent leasing for some years, and collecting the rents, and the acquiescence of the owner, be received as presumptive proof of the power of the agent. *Id.* 48
6. Action will not lie by a shipper of goods to be transported beyond sea, against the consignee of a vessel, on a disappointment of a voyage, if he knew the vessel belonged to a foreign house; *aliter*, against the owner or captain. *Joyce vs. Sims.* 409
7. If orders are given to a factor, they must be pursued, or he becomes liable; if none are given, or they are not clear, the factor may use his best discretion, according to the usage of trade. *Geyer vs. Decker.* 488
8. The mere declaration of an agent, or his acts as such, shall not be given in evidence to prove his agency. *Plumsted's lessee vs. Rudebach.* 502
9. If a factor takes a note in his own name for a debt due to his principal, the note belongs to the principal in case of the factor's bankruptcy. *Messier vs. Amory.* 533

AGREEMENT.

1. Agreement to sell lands, vendee pays part of the money, and is put into possession; vendor may maintain ejectment if the full consideration money is not paid. *Mitchell's lessee vs. De Roohe.* 12
2. Agreement between the proprietaries of Pennsylvania and Maryland, of the 4th July, 1780, cannot affect the rights of persons claiming under either previous thereto. *Lilly's lessee vs. Kitzmiller.* 23
3. An agreement shall not be set aside because the vendee did not inform the vendor of circumstances which vendor was bound to know and inform himself of. *Eicheberger's lessee vs. Barnitz et al.* 307
4. Where two or more executors sell lands openly and fairly, and they have been bought in by a stranger for one of them, such sale is not void necessarily; it is not merely of itself a fraud, but matter of evidence to be judged of. *Id.* 30
5. The welfare of society requires that fair contracts should be enforced. *Spear vs. Hannum.* 383
6. An instrument for the sale of lands construed as an agreement, though it contained words in the present, as, "Do sell and deliver," because such appeared to be the intention of the parties. *Campbell's lessee vs. Sproat et al.* 333
7. — Or, though it contains words of inheritance, and bonds were taken for the purchase money; there being also a covenant to do future acts, as to execute deeds, &c. *Stouffer's lessee vs. Coleman.* 383

ALIEN.

1. A French subject, who has taken the oath of allegiance to the United States, is not within the 12th article of the convention between America and France, dated 14th November, 1778. *Portier vs. Le Roy.* 371
2. In a suit between two French subjects, though the consul of France has given his decree in favor of the plaintiff, the Court will not hold the defendant to special bail. *Bertrand vs. Gautier.* 3
3. A Frenchman who has never assented to the French republic, established on the 21st September, 1792, and leaving the French West Indies, and settling in the United States, buying land therein, &c., is not within the 12th article of the consular convention between America and France. *Caignett vs. Rouge et al.* 546

AMENDMENT, STATUTES OF.

1. Amendment of a declaration shall not delay or injure the defendant. *Respublica v. Coates.* 35
2. Where the damages found by the jury exceed those laid in the declaration, the Court will allow a *remittitur* to be entered for the excess, after error brought. *Furry vs. Stone.* 193
3. Application for leave to amend *warr.* in ejectment cannot be made at *Nisi Prius.* *Howard's lessee vs. Pollock.* 509
4. Declaration in ejectment amended at *Nisi Prius*, to make it conformable to the record, after jury sworn. *Smith's lessee vs. Brown.* 513

APPOINTMENT.

1. The governor, and not the corporation of the city of Philadelphia, have the power of appointment of the clerk of the City Court. *John vs. Nichols.* 130

APPRENTICE.

(See Master and Servant.)

1. *Quære*, Whether an infant can bind himself apprentice, by deed indented, at common law. *Respublica vs. Keppel.* 235

ARBITRATION. AWARD.

1. A clear award appearing in the award of arbitrators shall be rectified. *Cornogg vs. Cornogg's executors.* 84

2. In replevin, a submission and award between the parties are evidence to prove the defendant's claim to goods, but not conclusive. *Murray vs. Paisley.* 197
3. Where arbitrators, or referees, under a rule of Court, have been guilty of gross injustice, or have made a plain mistake, the Court will interpose; but the injustice or error must be clearly and satisfactorily proved. *Wikoff et al. vs. Coxe et al.* 383

ASSETS.

1. Lands in Pennsylvania are assets for payment of debts, in case of deficiency of personal property. *Morris's executors vs. McConaughy.* 189
2. M. mortgages lands in his life-time, and devises all his real estate to his mother; she devises the mortgaged premises to D for life, with power to dispose thereof by will, and makes her executor's residuary devisees, who sell two of the tracts for payment of debts; sheriff levies on all the lands undisposed of, in payment of the mortgage money, on a judgment on the bond; adjudged that all the lands levied on shall contribute according to the value of the several tracts. *Id.*
3. Lands aliened *bona fide* by the heir are subject to the debts of the ancestor. *Morris's lessee vs. Smith.* 238
4. *Aliter*, of lands sold by executors, under a proper power, though they afterwards misapply the money. *Spear vs. Hannum.* 380
5. Lands are not more jointly made liable to the debts of a deceased person than personal estate was previous to the act of assembly of 1700. *Id.*
6. Where an administrator sells lands by virtue of an order of Orphan's Court, but embezzles the money, and becomes insolvent, the creditors cannot take the lands, thus sold, in execution. *Id.*

ASSIGNMENT.

1. Commissioners of bankrupt may assign debts due to him, but not *torts*. *Shoemaker et al. vs. Keely.* 245
2. Assignees of a bankrupt stand precisely in the situation of the bankrupt. *Stouffer's lessee vs. Coleman.* 399

ASSUMPSIT. ACTIONS ON THE CASE.

1. In special *assumpsit* for the delivery of wheat, or other specific articles, the general measure of damages is, to give the difference between the price contracted for and the price of the article at the time of the delivery. *Marshall vs. Campbell et al.* 36
— But this is a general rule, which implies exceptions according to the circumstances of the case. *Id.*
2. After a recovery in ejectment against the tenants, and the death of the landlord, *indebitatus assumpsit* will lie against his executors to recover the rents and profits received from the time the plaintiff's title accrued, unless the testator had no notice of the title, or held under a title in which he was mistaken, or there had been *laches* in the plaintiff. *Haldane vs. Ducho's executors.* 121
3. Such action cannot be supported at common law, but arises here from the necessary assumption of the powers of a Court of Equity, grounded on their maxims. *Id.*
4. If one does services for another at his request, no matter what his expectations were, *assumpsit* may well be supported to recover a compensation. *Roberts vs. Kidd's executors.* 209
5. *Assumpsit* will not lie by a shipper of goods, to be transported beyond sea, against the consignee of a vessel, on a disappointment of a voyage, if plaintiff knew the vessel belonged to a foreign house; *aliter*, against the owner, or captain. *Joyce vs. Sims.* 409
6. A contract for goods prohibited by law is void, and the buyer shall not be liable in an action for the price. *Condon vs. Walker.* 483
7. *Assumpsit* will not lie to recover back money paid under the sentence of a foreign Court, on a foreign attachment, however erroneous the proceedings may be. *Messier vs. Amery.* 533
8. In an action for use and occupation, a contract, express or implied, must be proved. *Pott vs. Leasher.* 576
9. Where the injury is immediate, trespass *vi et armis* lies; but where it is consequential, or collateral, case lies. *Le Gaux vs. Fearor.* 598

ATTACHMENT.

(See Contempt.)

ATTACHMENT. FOREIGN AND DOMESTIC.

1. Debts are attachable by foreign attachment, but the garnishee is not compellable to pay the money before it is due. *Walker vs. Gibbs.* 255
2. A judgment in a foreign attachment is not removable by *certiorari: aliter*, of the *scire facias* issued on it. *Id.*
3. The security given by the plaintiff, as to disproving the debt within a year and a day, must be in the Court where judgment was entered in the original action. *Id.*
4. The garnishee's answers to the interrogatories form a part of the record, and the Court will judge from the whole. *Id.*

5. The word "*exclusive*" in the verdict of a jury against garnishee, construed "*over and above*," to effectuate their plain intention. 51
6. A garnishee is not liable to pay interest pending an attachment, unless, perhaps, as between him and the defendant in the attachment, where he gives no notice of the attachment for a long time to such defendant. *Fitzgerald vs. Caldwell*. 274
7. Foreign attachments, since the act of 1706, have been governed by the same rules as in London, as nearly as convenience and the words of the act would admit. 51
8. If the original creditor sues the garnishee after an attachment executed in his hands, he may plead the attachment in abatement; and plaintiff may reply that it is kept on foot by fraud, and put that matter in issue to be tried. 51
9. If such money has been paid by the garnishee on a judgment, or execution has been executed; he may plead the condemnation in foreign attachment, and this will be an effectual bar for the amount. 51
10. A plea in abatement by garnishees, on a *scire facias* on a foreign attachment, that one of the partners is not named, is not good. *Brealsford et al. vs. Meade*. 458

ATTAINDER.

1. Lands forfeited by the attainder of a traitor can only be sold by the agents of forfeited estates. *Blaine's lessee vs. Crawford et al* 287
2. If traitor was seized of an estate tail, the state took it till he and his issue should be extinct, but no longer. *Kvans's lessee vs. Davis*.
1. Attorney at law has privilege in being exempted from the offices of overseer of the poor, supervisor of the public road, and constable; but not from arrests or militia duty. *Respublica vs. Fisher et al.* 350

BAIL.

1. Declaration filed, though not marked *de bene esse*, is no waiver of bail. *Caton vs. De Berdt et al.* 108
2. On a recognisance before a justice of the peace, in nature of special bail, the principal cannot be surrendered by the bail after the expiration of six months. *Speakman vs. Pearce*. 347
3. In a suit between two French subjects, though the consul of France has given his decree in favor of the plaintiff, the Court will not hold to bail. *Bertrand vs. Gautier*. 371

BANKRUPTCY.

1. The Court will not compel commissioners of bankrupt to give a certificate of conformity, though they should differ from the commissioners. *Respublica vs. Clarkson et al.* 46
2. To warrant a commission of bankrupt there must be a trading, a debt contracted, and an act of bankruptcy, subsequent to 16th September, 1783. *Joy's lessee vs. Cossart*. 50
3. Persons interested may contest the legality of the petitioning creditor's debt. 51
4. But *quære*, whether creditors who have received a dividend under the commission are not estopped. 51
5. W recovers a judgment against H in the Supreme Court, on a removal from Philadelphia county, and H afterwards sells land to I in Lancaster county, and then becomes a bankrupt; these lands may be taken in execution as the suit of W on a *testatum f. fa.*, the bankrupt laws not operating on lands conveyed anterior to the bankruptcy. *White's executors vs. Hamilton*. 153
6. A bankrupt may be committed for perjury in his examination before the forty-two days, or such further time as may be allowed for his examination. *Respublica vs. Wright*. 205
7. The commissioners may assign debts due to the bankrupt, but not *torts*. *Shoemaker et al. vs. Keely*. 245
8. Where, after a bankruptcy in England, and before payment to the assignees, money owing to the bankrupt, out of England, has been attached *bona fide*, the assignees cannot recover the debt. *Walker vs. Gibbs*. 257
9. Assignees of a bankrupt stand in his place precisely. *Stouffer's lessee vs. Coleman*. 300
10. If the payee of a note pay the balance thereof to an indorsee, under a judgment against him, after the bankruptcy of the maker, and after such indorsee has procured his dividend from the assignees by direction of the payee, *quære*, if he can recover against the maker, notwithstanding his bankruptcy and certificate. *Austin et al. vs. Slough*. 554
11. A surety in a bond, who pays the debt after his principal has been discharged by the bankrupt law of Maryland, is not barred by the chancellor's certificate. *Haddon vs. Chambers*. 559

BARON AND FEME.

1. Husband, before marriage, covenants with his intended wife, that she may dispose of her lands by will; she devises them during coverture; this shall operate as a good appointment, and her heir at law shall be bound, without any legal estate being vested in trustees. *Barnes's lessee vs. Hart*. 321

2. On a devise of lands in trust, the rents and profits to go to a feme covert during her life, unless it can be collected from the words of the will that it was intended for her separate use, her husband is entitled to them. *Torbert vs. Twining et al.* 432
3. Release to baron and feme, in the absence of the baron, to enable her to give testimony, is good. *Bioren's lessee vs. Keep.* 576

BILL OF EXCHANGE.

(See Promissory Note.)

1. In a suit by indorsees of a bill of exchange against the drawers, evidence cannot be received that it was customary to draw such bills as agents to a fund, and that no recourse could be had to the drawers under their special signature. *Reinhold et al. vs. Dertzell et al.* 39
2. A negotiable bill passes under the credit of the drawers. 46
3. The possession of a bill of exchange, and protest, is not sufficient evidence, without further proof, in a suit by the payee, or indorsee, against the acceptor, of a subsequent indorsee having received the amount of the bill. *Gorgerat et al. vs. M'Carty.* 94
4. Bill of exchange lost, and an indorsement forged thereon, and the money paid by the acceptors (who were of the same house with the drawers), the real payee shall recover the money. 46
5. In bills payable to order, there is a distinction between those which are indorsed in blank and such as are specially indorsed, possession in the former case is evidence of title, but not in the latter. 46
6. A suit may be brought against the drawer of a bill of exchange for non-acceptance, before it becomes payable, but the party is only entitled to interest from the notice of protest, not to the 20 per cent damages. *Taan vs. Le Gaux.* 204
7. The current rate of exchange at the time of trial must determine the sum to be recovered; if there is no such rate, it must be fixed at par. 46
8. Whether reasonable notice of a bill being dishonored has been given by an indorsee to an indorser, has been usually left to the jury, and the strictness of notice in England has not been adopted. *Warder et al. vs. Bell et al.* 531

BILL OF SALE.

(See Sale of Goods.)

BILLS, BONDS.

1. A bond may be declared on as lost by time and accident, without a protest. *Respublica vs. Coates.* 2
2. Non-payment of money at the day is a forfeiture of a counter bond. *Ross's executors vs. Bittenhouse.* 443

BY-LAW.

(See Corporation.)

CASE, ACTIONS ON.

(See Assumpsit.)

CERTIORARI.

1. *Certiorari* no supersedeas to proceedings between landlord and tenant. *Stewart vs. Martin.* 46
2. It is not to be expected that justices of the peace should make a return to a *certiorari*, with strictly legal precision. *Finney vs. M'Mahon.* 249
3. A judgment in a foreign attachment cannot be removed by *certiorari*; *aliter*, of the *scire facias* on it. *Walker vs. Gibbs.* 255

COMMISSION TO EXAMINE WITNESSES.

1. Depositions of witnesses taken under a commission allowed to be read in evidence, though all the plaintiff's interrogatories have not been answered; the commissioners on both sides, and one of the plaintiffs, having attended the execution of the commission. *Stewart vs. Ross.* 148

2. So, though it did not appear that they were sworn by the commissioners. *Vaughan et al. vs. Blanchard.* 175
3. A commission to two cannot be executed by one, without notice to the commissioner of the other party. *Hoofnagle vs. Dering.* 302
4. A commission to examine witnesses, executed irregularly, the witnesses not being examined to the interrogatories, the depositions cannot be read in evidence. *Miller vs. Dowdle.* 494

COMMISSIONERS OF COUNTIES. SALES BY

(See Taxes.)

COMMON RECOVERY.

1. It was formerly held that common recoveries could not be legally suffered in Pennsylvania, and the practise was not generally adopted until the act of assembly of 1750; and the old mode of docking entails was by selling the lands for the debts of the testator. *Morris's lessee vs. Smith.* 238
2. Common recoveries by the heirs of donees in tail have been suffered by those who would take by the course of the common law. *Sauder's lessee vs. Morningstar.* 313
3. Common recovery suffered by husband alone, of lands intailed, which have been sold by due process of law, will not bar his widow of dower, though it may bar the issue in tail if properly conducted. *Sharp vs. Pettit.* 389

COMPTROLLER GENERAL.

1. The comptroller general has no power to settle demands arising from *forts.* or the wrongful acts of any of the officers of the state. *Newbold's executors vs. Rempubli-* 140
cam.

CONTEMPT.

1. Attachment will issue for contemptuous expressions of the Court, without granting a rule to show cause. *Thomas's lessee vs. Cummins.* 1
2. Contempt of another Court will not be punished by the Supreme Court. *Penn's lessee vs. Messinger.* 2
3. Where attachment can issue to compel the attendance of a witness at *Nisi Prius*, the judge will award it; otherwise, the application must be made in bank. *Knight's lessee vs. Pechen.* 15
4. One brought in on an attachment, and purging himself of the contempt, shall be discharged. *Thomas's lessee vs. Cummins.* 40
5. A witness may, by his own conduct, dispense with the legal forms of serving a subpoena, and will be under a contempt for non-attendance. *Ferree vs. Strome.* 303
6. A public officer is guilty of contempt who refuses to furnish copies of papers wanted on a trial, though applied to after office hours. *Delaney vs. Regulators of Philadelphia.* 408

CONTINGENT REMAINDER AND EXECUTOR DEVISE.

1. It is not the uncertainty of ever taking effect in possession, but the *present capacity* of it, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, which distinguishes a *vested remainder* from one that is *contingent*. *Evans's lessee vs. Davis.* 349
2. A vested remainder may be well limited after an estate tail, whether the estate tail be vested or contingent; but after a contingent fee is limited, no subsequent limitation can be vested. 353

CONTRIBUTION.

1. Suit brought on a bond accompanying a mortgage; the Court will not prevent plaintiffs from levying on what lands they please, but when the money is brought into Court they will decide how it shall be disposed of, and who shall make contribution. *Morris's ex-* 3, 189
ecutors vs. McConaghy's executors.

CONVEYANCES AND DEEDS.

1. The general rule is, that a deed, or other written instrument shall be expounded by its own words; but there are exceptions to it, as where parol evidence is brought to ascertain a person, or thing; to rebut an equity; or where a matter has not been inserted by fraud or mistake. *Field et al. vs. Biddle.* 133
2. Neither the state nor an individual can grant a title to lands which they have not. *Blaine's lessee vs. Crawford et al.* 261
3. No one shall be permitted to overturn his own deed by subsequent expressions. *Simon's lessee vs. Gibson et al.* 261

4. A deed between a father and son, a minor, though fraudulent as to creditors, is yet binding as between the parties. 43.
5. Where there has been a conveyance of lands by courses and distances, which truly describe the premises, but the quantity of land said to be conveyed is deficient, and there is no express covenant insuring such quantity, vendee cannot recover damages against the vendor. *Dagne vs. King and wife.* 323
— In such case, if there had been a surplus of land, the vendor must have been satisfied with the sum he had received; and where it is short in quantity, the vendee must also be satisfied. 43.
6. An instrument for the sale of lands, construed as an agreement and not as a deed, though it contained words in the present tense, as "do sell and deliver," because such appeared to be the intention of the parties. *Campbell's lessee vs. Sproat.* 323
7. So, where the words were, "do grant, bargain, and sell," &c., and bonds had been taken for the purchase money. *Stouffer's lessee vs. Coleman.* 393
8. The strict forms of conveyances have not been applied to imperfect rights. Sales of improvements have been proved by parol evidence alone. *Paxton's lessee vs. Price.* 500
9. So, an assignment of an application, without words of inheritance, for a valuable consideration. *Lynn's lessee vs. Downes.* 520

CORPORATION BY-LAWS.

1. Return to a *certiorari* on a recovery before the mayor, in debt on a city ordinance, need not set out the evidence. *Carlisle vs. Baker.* 471
2. It is a fatal exception to such a recovery that a summons has issued on two different charges, and a judgment had on one without taking notice of the other. 43.
3. A city ordinance inflicting penalty on persons placing goods on their porches or cellar doors, projecting more than six inches into the street, is bad. 43.

COSTS.

1. Full costs in trespass may be given by a jury, though damages are found under 50*l.* *McKisson vs. Steal.* 1
— So of referees. *Cornogg vs. Cornogg's executors.* 253
2. Costs of not going on to trial ordered to continue on the *remand*, where there have been reasonable expectations of a compromise. *Cornogg vs. Cornogg's executors.* 18
3. Where an ejectment is submitted to a reference, and the report is for plaintiff, but finds no costs, they shall be awarded. *Harvey, in error, vs. Austin's lessee.* 156
4. *Quære*, Whether a plaintiff is compellable to pay the costs of the term before the action is continued, when he will not try it under his *distringas*. *Welch's lessee vs. Baker et al.* 171
5. Application for a rule for security for costs, in the case of a foreign plaintiff, is never too late, unless it goes to procure delay. *Shaw vs. Wallis.* 176
6. In debt, by original process, against a clergyman, for marrying a minor without consent of his parent, the plaintiff is entitled to costs. *Norris vs. Pilmore.* 405

COURT. FOREIGN. LEX LOCI

1. After a bankruptcy in England, and before payment to the assignees, where money owing to the bankrupt has been attached *bona fide*, according to the *lex loci*, the assignees of the bankrupt cannot recover such debt. *Walker vs. Gibbs.* 257
2. On a promissory note given at Wyoming in 1778, for so much "lawful money," it shall be intended for so much lawful money in Connecticut, and governed by the scale of depreciation of that state. *Dorrance vs. Stewart.* 349
3. The sentence of a foreign Court, having jurisdiction of the subject matter, is conclusive. *Messier vs. Amery.* 533
4. Where one has received money under such a sentence on a foreign attachment, however erroneous it may be, it cannot be recovered back, as money received to the true owner's use. 43.

COVENANT. ACTION OF

1. Where there has been a conveyance of lands by courses and distances, which truly describe the premises, but the quantity of land said to be conveyed is deficient, and no express covenant insuring such quantity, covenant will not lie to recover damages. *Dagne vs. King and wife.* 323
— On such a conveyance by husband and wife, the suit should be brought against the husband only. 43.

CUSTOM, USAGE.

1. There is no custom in Pennsylvania to land or receive freights on another's freehold, on the banks of a navigable river, without his consent. *Chambers vs. Furry.* 167
2. The custom and usage has been to consider improvements made *animo residenti*, and even warranted and surveyed lands as personal chattels, until 1758. *Duncan's lessee vs. Walker.* 213

- They were appraised as such, and sold in the common course of administration, and even by executors *de son tort*. 25.
- Such sales, made *bona fide* for payment of debts, or bringing up minor children, have always been sanctified; but that custom is now discontinued. 25.
3. The custom of the land office, where the original improver or taker up of the land has died, is to grant it to the heirs of the decedent, or in trust for their use, or to the devisees. 25.
4. The custom to bind minors as indentured servants is confined to servants imported from abroad. *Respublica vs. Keppeler*. 233
5. The characteristics of a good usage are to be generally used and approved. 25. 237

CUSTOM OF MERCHANTS.

(See Merchant.)

DAMAGES.

1. In special *assumpsit* for the delivery of wheat, or other specific articles, the general measure of damages is to give the difference between the price contracted for and the price of the article at the time of the delivery. *Marshal vs. Campbell et al.* 36
2. But this is a general rule, which implies exceptions according to the circumstances of the case. 45.
3. Large damages directed to be given to compel a defendant to do justice. *Clyde vs. Clyde*. 52
- So, *Walker vs. Butts*. 574
4. Damages in dower to be found since the time of the demand made, either in *pos* or by matter of record; but not of the improved value after a sale by the husband. *Winder vs. Little*. 152
5. Where damages only are to be recovered, if none are found, the verdict would be bad; *aliter*, in ejectment, debt, &c., where any thing is to be recovered besides damages. *Harvey, in error, vs. Austin's lessee*. 155
6. Where damages found by the jury exceed those laid in the declaration, the Court will allow a *remittitur*, to be entered for the excess after error brought. *Furry vs. Stone*. 186
7. In *indebitatus assumpsit*, damages given for the vexatious delay of payment. *Balsch vs. Hoff*. 196
8. On bills of exchange protested for non-acceptance, 20 per cent damages not recoverable in Pennsylvania. *Taan vs. Le Gaux*. 204
9. Consequential damages not recoverable against the consignee of a vessel or factor, unless he has been grossly in fault. *Joyce vs. Sims*. 409

DEBT. ACTION OF.

1. A memorandum endorsed on an account, whereby the debtor promises to pay interest, will not support debt. *Joy's lessee vs. Cossart*. 54
2. Debt will lie on a stipulation taken in the admiralty, which, though void as such, may operate as a contract for a sum certain. *Le Case vs. Mallet*. 55
3. Debt lies on any covenant where the sum is reducible to a certainty. 56. 70

DECLARATION.

1. Declaration in ejectment must lay the demise after the plaintiff's title accrued. *Campbell's lessee vs. Sproat*. 197
2. Where no declaration has been filed in plaintiff's life, and the suit has been continued after his death, under the act of assembly of 13th April, 1791, it must be filed in the names of the original parties. *Clow and Gay vs. Brown et al.* 334
3. In a declaration in ejectment, repugnant words considered as surplusage. *Lynn's lessee vs. Downes*. 513

DEEDS.

(See Conveyances.)

DEFALCATION. SET-OFF.

1. If a set-off be pleaded in a bar to an action, defendant is not bound to give any written notice to the plaintiff, who should reply the act of limitations if the set-off demand was thereby barred. *Jacks vs. Moore*. 351
2. If a set-off be offered in evidence on a notice of set-off, it cannot be received where it is barred by the act. 56.
- Unliquidated damages in covenant, sounding in *tort*, cannot be defalked under the plea of payment in a suit on a bond. *Kachlein et al. vs. Ralston et al.* 571

DEMURRER.

1. A general demurrer confesses only matters of fact, which are well pleaded. *Wikoff et al. vs. Cox et al.* 356

DESCENT, HEIR.

1. Lands aliened *bona fide* by the heirs are subject to the debts of the ancestor. *Morris's lessee vs. Smith.* 238
2. No descent or distribution in Pennsylvania can give children an indefeasible right in the lands of the intestate, but they continue subject to the intestate's debts. *ib.* 243
3. Lands in Pennsylvania which are intailed descend according to the course of the common law. *Sauder's lessee vs. Morningstar.* 313
4. The act of assembly of 1706 only regulates the descent of lands among the children where the father is seized thereof, and might dispose of them by deed or will. *ib.*

DEVISE.

1. Devise of one sixth part of the residue of his estate to each of his children in Germany, "Provided that they, their children, or grand-children shall transmit proofs to his executors within six years after testator's death, of their being alive; and after the said six years, no proof to be admitted; but the said residue shall be divided among such of his children and grand-children as can make such proof, and shall have made it within the aforesaid space of time." Proof was made within the time, but was inevitably prevented from being sent forward. Adjudged that such devisee was entitled to his residuary share; and the word and shall be construed *or* to effectuate testator's intent. *Englefried vs. Woelfart et al.* 41
2. Devise of mortgaged lands to one for life, with power to dispose thereof by will at her death; this is a specific devise; *alter*, of the residuary devisees. *Morris's executors vs. McConaugh's executors.* 189
— And the whole of testator's land being taken in execution for the payment of his debts, shall contribute according to the value of the several tracts. *ib.*
3. Testator devises: "To his son, E, his heirs and assigns, seven acres of land, and to his wife, C, and son, I, all the residue of his estate, real and personal; if either of his sons shall die unmarried and without lawful issue, then the survivor to enjoy the estate of his deceased brother; and after the decease of his said wife, the said I and E, or the survivor of them shall and may, for them, their heirs, executors, and assigns, under the above limitations, enter and take possession of my said real estate," &c. The widow assigned her interest to I, who afterwards suffered a common recovery, married and died without issue. Resolved, that if I took an estate tail, it was barred by the recovery; if an estate in fee simple, both events, of his dying unmarried and without issue, must concur to vest the estate in E. *Griffith's lessee vs. Woodward et al.* 316
4. A devises all the rest and residue of her estate to I during the term of his natural life, and if he leaves lawful issue, then she gives her real estate unto such issue, but in case of his dying without such issue, or they dying under twenty-one, and without lawful issue, then she devises all her real estate to B, his heirs and assigns, on condition that he or they pay to the managers of the Pennsylvania Hospital 300*l.* in three months after the decease of I. Adjudged, that I took an estate tail, which was forfeited to the state by his attainder of treason until he and his issue should be extinct, and the remainder limited to B is a vested remainder, which may well take effect on the payment of the 300*l.* *Evans's lessee vs. Davis.* 333
5. Devise of lands to I and S, their heir and assigns; provided, always, if they shall die under age, and without issue, then remainders over; these remainders only can take place on the happening of both contingencies, their dying under age, and without issue. *Cheesman's lessee vs. Wilt.* 411
6. Where the words of a will are plain, the intent always follows the words; a will cannot be added to, nor its omissions supplied. *ib.*
7. On a devise of lands in trust, the rents and profits to go to a feme covert during life, unless it can be collected from the words of the will, that it was intended for her separate use, the husband is entitled to them. *Torbert vs. Twining.* 432
8. Intention of a testator must be gathered from the words of his will, taken all together. *Lynn's lessee vs. Downes.* 518

DISTRIBUTION.

(See Intestates.)

DIVORCE.

1. Divorce from bed and board may be granted in the first instance, where it appears on the proofs that the person of the wife cannot be safe, though the husband offers to receive her. *Kinsey vs. Kinsey.* 78
2. The act of assembly is not compulsory on the Court, but rests in their discretion to permit the husband to receive the wife against her consent. *ib.*
3. On issuing *subpoenas* in cases of divorce, a rule may be made to take depositions before the return thereof. Anonymous. 404

DOWER.

1. Dower of the wife is barred by the sheriff's sale of the lands under a *levari facias* on a mortgage, executed by the husband alone, after marriage. *Scott vs. Croasdale.* 75

2. Damages in dower to be found since the time of the demand made, either *in pais*, or by matter of record; but not of the improved value after a sale made by the husband. *Winder vs. Little*. 153
3. A woman shall be endowed even of an estate tail determined. *Sharp vs. Pettit*. 309
4. Where the lands of a husband, whereof he is seized in fee tail, and sold on judgments obtained against him, and he afterwards suffers a common recovery, without making his wife a party, or her executing the deed to lead the uses, and she survives him, her dower is not barred. 53
5. Devise by testator to his wife, not expressed to be in lieu of dower, and where her claim of dower is not inconsistent with, or in contradiction to, the will, the widow is entitled to her dower at common law. *Evans's lessee vs. Webb*. 424
6. A devisee may recover in ejectment in such case against the widow, without previously assigning her dower. 45

EJECTMENT. ACTION OF

1. On an agreement to sell lands if vendee pays part of the money, and is put into possession, vendor may maintain ejectment if the full consideration money is not paid. *Mitchell's lessee vs. De Roche*. 12
2. Ejectments are mere fictions; but the Court will convert them into fair trials between the proper parties. The Court are therefore bound to take notice of the real parties in ejectment. *Campbell's lessee vs. Sproat*. 30
3. Ejectments may be submitted by rule of reference, and where the report is for the plaintiff, but finds no costs, they shall be awarded. *Harvey, in error, vs. Austin's lessee*. 156
4. Where, in ejectment or debt, damages are not found by the verdict, it is still good. 53
5. Landlord may proceed by ejectment, to recover possession against his tenant. *Fitch Alden, in error, vs. Lee*. 100
6. In ejectment by the sheriff's vendee, under a mortgage in the loan office, the mortgage and precept to the sheriff must be produced in evidence. *Marshall's lessee vs. Ford*. 196
7. In ejectment, where plaintiff claims under an article of agreement, and defendant holds under a previous parol agreement, and possession delivered, and a subsequent deed from the same person, his declarations previous to the article, shall not be given in evidence to corroborate the proof of the parol agreement, he being a defendant in the suit. *Campbell's lessee vs. Sproat et al.* 196
8. Where, in ejectment, plaintiff comes into Court to ask equity, he must do equity himself. *Stouffer's lessee vs. Coleman*. 309
9. In a declaration in ejectment, repugnant words shall be considered as surplusage. *Lynn's lessee vs. Downes*. 518
10. After three trials in ejectment, the Court will stay proceedings. *Cherry's lessee vs. Robinson*. 521
11. In ejectment by baron and feme, in right of feme, advantage may be taken on the general issue, of the woman being the wife of another person. *Loper's lessee vs. Mayor et al.* 551

ERROR, WRIT OF ERROR.

1. Where proceedings between landlord and tenant are reversed for error, the Court is not bound, *ex debito justitiae*, to award restitution. *Fitch Alden vs. Lee*. 100, 307

ESTOPPEL.

1. Persons interested may contest the legality of the petitioning creditor's debt on a commission of bankrupt; but *quere*, whether creditors who have received a dividend under the commission, are not estopped. *Joy's lessee vs. Cosart*. 89
2. Persons may estop themselves, not others, by mutual agreement. *Hughes's lessee vs. Dougherty*. 467

EVIDENCE.

1. On a motion to set aside the report of auditors under the depreciation act, the Court will not receive evidence of the value of the property sold. *Lee vs. Biddis*. 8
2. The rules of evidence in cases of pedigree are much relaxed. *Douglas's lessee vs. Sanderson*. 15
3. *Ex parte affidavit*, made in England, is evidence in such a case. 53
4. So, the leaf extracted from a family Bible, containing entries of births and deaths of children, sworn to by some of the children, is good evidence. 53
5. In *trover*, plaintiff must prove property in the thing in controversy. *Yoner vs. Neldig*. 19

6. Vendees under sheriffs, or auditors under the attachment law, shall not be put to the same proof in ejectment, as in common cases. *Bowman's lessee vs. Fry.* 21
7. Where the debtor has been in possession, the *onus probandi* shall lie on the adverse party. 26
8. The return of the surveyor, in Pennsylvania, is only evidence of the survey; and his frauds and mistakes may be examined by parol proof. The courses and distances run on the ground are the true survey; but in Maryland, the courses and distances returned to the proprietary office form the survey. *Lilly's lessee vs. Kitmiller.* 28
9. *Ex parte affidavits* to establish independent facts cannot be received in evidence. 28
10. Bill of lading signed by the captain of a ship, at a foreign port, was allowed in evidence in a suit by his executors against the owners, to show the usage of trade, at that port. *Vicary's executors vs. Ross et al.* 33
11. In a suit by indorsees of a bill of exchange, evidence cannot be received that it was customary to draw such bills as agents to a fund, and that no recourse could be had to the drawer, under this special signature. *Rheinhold et al. vs. Dertzell et al.* 39
12. Will proved before the register, or under a feigned issue, has always been received as evidence; but such probate is not conclusive evidence of a devise of lands. *Walmsley's lessee vs. Read.* 87
13. Though one cannot claim a title to a water course but by deed, yet in special *assumpsit* for damages on a breach of contract, it may be proved by oral testimony. *Clyde vs. Clyde.* 92
14. The possession of a bill of exchange, and protest, is not sufficient evidence, without further proof, in a suit by the payee, or indorsee, against the acceptor, of a subsequent indorsee having received the amount of the bill. *Gorgerat et al. vs. McCarty.* 94
15. In bills payable to order, there is a distinction between those indorsed in blank and those specially indorsed; possession in the former case is evidence of title, not in the latter. 96
16. The general rule is that a deed, or will, or other written instrument, shall be expounded by its own words; but there are exceptions to it; as where parol evidence is brought to ascertain a person or thing; to rebut an equity; or, wherever a matter has not been inserted by fraud or mistake. *Field et al. vs. Biddle.* 132
17. Where a covenant is silent as to the kind of money to be paid, parol proof may be received to discover the intentions of the contracting parties. 132
18. In a suit against the owners of a vessel for the misconduct of the captain, the opinion of counsel, taken on all the facts by the captain in the West Indies, allowed to be read in evidence as a fact. *Hartshorne et al. vs. Campbell et al.* 143
19. Depositions of witnesses, taken under a commission, allowed to be read in evidence, though all the plaintiff's interrogatories have not been answered; the commissioners on both sides, and one of the plaintiffs, having attended the execution of the commission. *Stewart vs. Ross.* 148
20. An *ex parte affidavit* is good evidence to prove the identity of a person, so far as respects his marriage, or pedigree. *Winder vs. Little.* 152
21. Warrant dated 20th August, 1765: A survey made in pursuance of a warrant dated 21st August, 1765, may be read in evidence, if the lines correspond with the terms of the first warrant, and a certificate of the surveyor general is shown that no such warrant of the 21st August, 1765, is to be found in his office. *Brown's lessee vs. Long.* 162
22. A deed proved to be executed by several of the grantors, though not by them all, and not recorded, may be read in evidence. 162
23. Depositions of witnesses, taken under a commission, allowed to be given in evidence, though it did not appear that they were sworn by the commissioners. *Vaughan et al. vs. Blanchard et al.* 175
24. A bill of lading not signed, but kept by the captain for his own use, is no evidence to show that goods were shipped and a bill of lading signed. *Wood vs. Roach et al.* 177
25. On a plea of *nulla bona* to a foreign attachment, with leave to give the special matters in evidence, written notice having been given that defendant would insist on the non-payment, or tender of freight of the goods shipped, it may be given in evidence without pleading the cause of detainer specially. 177
26. On the defendant's submission to an indictment for a libel, his *affidavit* to show the provocation he had received, in order to mitigate the fine, refused by the Court. *Respublica vs. Askew.* 186
27. In ejectment by the sheriff's vendee, under a mortgage in the loan office, the mortgage and precept to the sheriff must be produced in evidence. *Marshall's lessee vs. Ford.* 195
28. Where the plaintiff claims under an article of agreement, and the defendant holds under a previous parol agreement, and possession delivered, and a subsequent deed from the same person, his declarations previous to the article shall not be given in evidence to corroborate the proof of the parol agreement, he being a defendant in the suit. *Campbell's lessee vs. Sproat et al.* 196
29. In replevin, a submission and award between the parties are evidence to prove the defendant's claim to goods, but not conclusive. *Murray vs. Paisley.* 197
30. In *indebitatus assumpsit* for goods sold, an entry in the defendant's day book that he had received the goods to be sold on commission for the plaintiff's account, is no evidence. *Baisch vs. Hoff.* 198
31. The power of an agent to rent lands must be proved by other testimony than that of the agent; if there be a written power, it should be produced; if it is burnt, or lost, the contents of it should be proved. *Meredith's lessee vs. Macosa.* 200
32. Neither shall the agent leasing for some years, and collecting the rents, and the acquiescence of the owner, be received as presumptive proof of the power of the agent. 200

33. The protest of the captain of a ship must be made at the first port where he arrives after the vessel's misfortune; otherwise it shall not be received in evidence. *Boyce v. Moore.* 201
34. The exceptions to this rule must be satisfactorily proved. 201
35. The rule that a party shall not be permitted to give testimony to invalidate an instrument which he has signed, is now confined to negotiable instruments. *Pleasants v. Pemberton.* 213
36. Evidence shall not be received of the declarations of the secretary of the land office, at the time of issuing a warrant, or of the claim of the party, to certain lands, or of his intentions in taking out the warrant. *Nesbit's lessee v. Titus et al.* 224
37. But applications to the deputy surveyor to make a survey, and what passed thereon, is good. 225
38. Subsequent expressions of a grantor shall not be given in evidence to invalidate his own deed. *Simon's lessee v. Gibson et al.* 231
39. Certificate of the surveyor general, that he had issued a special order to a deputy surveyor to survey lands, allowed to be read in evidence under special circumstances. *Todd's lessee v. Ockerman.* 235
40. In ejectment for lands sold by a constable, for not serving a tour of duty in the militia, or procuring a substitute, the vendee must give in evidence the warrant of the lieutenant, or sub-lieutenant, to levy the fine, and all the other steps, preliminary to the sale, as required by the law. *Gilbert's lessee v. Probst.* 300
41. Depositions taken by the commissioner of the defendant cannot be read in evidence where the commission is directed to two, without notice to the plaintiff's commissioner. *Hoofnagle v. Dering.* 303
42. In ejectment by a sheriff's vendee, the declarations of the debtor that he had previously sold the lands to another, can not be given in evidence to overreach a judgment obtained against him, and a consequent sale. *Baker's lessee v. Miller et al.* 305
43. A copy of entries in a day book, where it appears, by a deposition annexed, that the original entries were not made when the transactions happened, but many of them were made some months after, without distinguishing the regular from the irregular entries, and without assigning any reason for this irregularity, cannot be received in evidence. *Vance v. Feariss.* 321
44. In a mercantile case the Court will be liberal, and allow almost every possible species of evidence to go to the jury. 32
45. In ejectment for lands on Pine creek, under the act of assembly of 21st December, 1784, it is indispensably necessary to show in evidence that lessor of plaintiff had paid or tendered the consideration thereof to the receiver general, on or before the 1st November, 1785. *Cook's lessee v. Eppele.* 324
46. Where length of time is no positive bar against the recovery of a bond, circumstances may be given in evidence to fortify the presumption of payment. *Penrose et al., exors. v. King.* 344
47. The presumption of payment of a bond, arising from length of time, shall be suspended between 1st January, 1776, and 21st June, 1784, under the law passed 12th March, 1783. 35
48. A day book is evidence, not only of the delivery of goods, but also of their prices, *prima facie*; *aliter*, of money lent, or cash paid. *Ducolgn v. Schreppele.* 347
49. The evidence of jurors eating and drinking at the expense of the party for whom the verdict has gone, must be clear and full. *M'Causland's lessee v. M'Causland.* 373
50. The declarations of the widow of the testator (to whom the real estate was devised for life), that the will was made by her undue influence and imposition on the testator, shall not be given in evidence to operate against the remainder man. *Gallagher's lessee v. Rogers.* 390
51. A set-off barred by the act of limitations cannot be given in evidence on a notice of set-off; *aliter*, where the set-off is pleaded in bar, unless plaintiff replies the act of limitations. *Jacks v. Moore.* 381
52. Where a dispute had been submitted to arbitrators, and a witness had been sworn before them, who is since dead, his deposition shall be read in evidence between the same parties. *Arwin's lessee v. Bisbing.* 400
53. Hearsay evidence has been often received to establish boundaries. 41
54. Depositions not allowed to be taken out by the jury unless by consent. 42
55. A commission to examine witnesses, executed irregularly, the witnesses not being examined to the interrogatories, the depositions cannot be read in evidence. *Miller v. Dowdle.* 404
56. The declarations of a deceased person, shortly before his death, who had been bound over to answer a charge of mayhem, cannot be given in evidence by the other defendant. *Republica v. Landcake et al.* 415
57. Parol evidence is not admissible to supply, contradict, or explain the written words of a will. *Torbert v. Twining.* 423
58. A deed respecting the lands in question, duly proved, ought to be admitted in evidence. *Bioren's lessee v. Keep.* 440
59. If the commonwealth proves acts of violence, or fraudulent seduction of a negro in this state, other acts of violence or fraud in another state may be proved to show the intention of the defendant. *Republica v. Richards.* 480
60. Answers of the garnishee, in foreign attachment, to interrogatories filed against him, cannot be received on the argument of a demurrer. *Brealsford et al. v. Meade.* 488
61. Recitals in a conveyance are evidence of pedigree. *Paxton's lessee v. Price.* 500
62. Sales of improvements have been proved by parol. 51
63. Improvements on the lands within the Indian purchase shall not be given in evidence to defeat a legal title, unless the party has applied for an office right within a reasonable time. *Plucas ed's lessee v. Rndebach.* 502

64. The mere declaration of an agent, or his acts as such, shall not be given in evidence to prove his agency. 45.
65. Awards, not pursuing the submission, cannot be received in evidence. *Howard's lessee vs. Pollock.* 509
66. Unliquidated damages in covenant, sounding in *tert*, cannot be given in evidence, by way of defalcation, under the plea of payment, in a suit on a bond. *Kachlein et al. vs. Ralston et al.* 571
67. In an action for use and occupation, a contract, express or implied, must be proved. *Pott vs. Leshner.* 578
68. A lapse of 18½ years is not sufficient to found a presumption of payment of a bond, and circumstances may repel that presumption. *Matter's executors vs. Bullman.* 584
69. The declarations of a mere stranger, that a bond was paid, shall not be received in evidence. 45.

EXECUTION.

1. Suit brought on a bond accompanying a mortgage; the Court will not prevent the plaintiffs from levying on what lands they please; but when the money is brought into Court, they will decide how it shall be disposed of and who shall make contribution. *Morris's executors vs. McConaughy's executors.* 9
— In this case, M had mortgaged certain lands in his life-time, and devised all his real estate to his mother; she devised the mortgaged premises to D for life, with power to dispose thereof by will, and make her executors legatees of the residue, who sell two of the tracts for payment of debts; and the sheriff having levied on all the undisposed lands, adjudged that all lands levied on shall contribute according to the value of the several tracts. S. C. 189
2. Lands of a bankrupt, which he conveyed before his bankruptcy, may be taken into execution under a judgment previous to the conveyance, whereon no execution was issued and levied before the bankruptcy. *White's executors vs. Hamilton.* 183
3. R devises certain lands to S, his widow, for life, remainder to his two children. S and the children mortgage the lands, which are sold under a *levari facias*; the widow shall be allowed to take the surplus money out of Court, giving security for the payment of the principal sum after her death. *Bloomfield vs. Budden.* 187
4. All possible contingent titles in lands, accompanied with a real interest, may be seized and taken in execution. *Humphreys's lessee vs. Humphreys.* 427
5. It is necessary to hold inquisitions on estates for life, or reversions, of remainders, previous to a sheriff's sale. 45.
6. A mortgage, payable by instalments, all of which become due within seven years next after an inquisition taken, must be taken into consideration by the jurors. *Pulaski vs. King.* 477

EXECUTOR.

(See Administrator, Assets.)

FERRY, BRIDGE, HIGHWAY, ROADS.

1. In a highway, the right of passage belongs to the public; but the right to the soil, wood, stones, and grass, continues in the owner of the lands. *Chambers vs. Furry.* 167
2. There is no custom in Pennsylvania to land or receive freight on another's freehold on the banks of a navigable river, without his consent. 45.
3. The right of passage over ground may be as well secured by private grant as by a public laid-out road. *Delaware and Schuylkill canal vs. Alexander.* 430
4. Roads, private or public, laid out across the Delaware and Schuylkill canal, shall not be bridged by the canal company. 45.

FORCIBLE ENTRY AND DETAINER.

1. Prosecutions for forcible entry and detainer to be discouraged, unless there is an evident force against the party in actual possession. *Respublica vs. Devore.* 501
2. The statutes concerning them, formerly construed liberally, on a change of circumstances, to receive a strict construction. 45.

FORFEITURE.

1. Lands forfeited by the attainder of a traitor can only be sold by the agents of forfeited estates. *Blaine's lessee vs. Crawford et al.* 397
2. Lands held in fee tail are forfeited to the state only during the life of tenant in tail, and until his issue shall be extinct. *Evans's lessee vs. Davis.* 363

FRAUD.

1. A deed between father and son, a minor, though fraudulent as to creditors, is yet binding between the parties. *Simon's lessee vs. Gibson.* 391

2. An agreement shall not be set aside because the vendee did not inform the vendor of circumstances which the vendor himself was bound to know, or inform himself of. *Eichelberger's lessee vs. Barnitz.* 307
2. Where two or more executors sell lands openly and fairly, and they have been bought in by a stranger for one of them, such sale is not void necessarily; it is not merely of itself a fraud to vacate the contract, but matter of evidence to be judged of. 52
4. Where there is reason to believe that a bond has been given to defeat creditors, the Court will decree an issue to try the validity of the bond, and quantum of the debt. *M'Neal vs. Smith.* 552

GOVERNOR.

1. The governor, and not the corporation of the city of Philadelphia, has the power of appointment of the clerk of the City Court. *John vs. Nichols.* 180

GUARDIAN.

1. A guardian, who has signed a receipt for his ward, having a release, may, under special circumstances, be a witness to prove what passed at and immediately before the receipt. *Pleasants vs. Pemberton.* 208
2. Guardian cannot bind out his ward as a servant. *Respublica vs. Keppela.* 232

HABEAS CORPUS.

1. *Habeas corpus* will not lie to remove a cause after it has been referred and the auditors have examined the witnesses, though they have not agreed on their report. *Grub vs. Grub's executors.* 186

HEIR.

(See Descent.)

HIGHWAY.

(See Farry.)

INDICTMENT. INFORMATION.

1. Indictment for adultery will not lie against an unmarried person; but on such indictment the defendant may be convicted of fornication. *Respublica vs. Roberts.* 6
2. Information will not be granted against a justice of the peace for extortion or oppression where he has taken the usual fees, and there has been no criminal intention to oppress. *Respublica vs. Hannum.* 71
2. Where a party moves for an information, he must enter into a recognisance for payment of costs. *Respublica vs. Prior.* 208
4. *Aliter*, where the attorney general moves for the rule officially. 53
5. On the rule to show cause, the oaths of defendant and his witnesses must be reduced to writing. 52
6. Information lies against a justice of the peace, for taking the recognisance of a person charged with assault and battery, himself in *thirty shillings*, and two sureties in *fifteen shillings* each. *Respublica vs. Burns.* 370
7. So, for not actively assisting in suppressing a riot. *Respublica vs. Montgomery.* 419

INFANT.

1. Guardian cannot bind out his ward as a servant; nor can a parent, for money paid to himself. *Respublica vs. Keppela.* 232

INNKEEPER.

1. An innkeeper is liable for whatever is deposited in his house; but if the trust is reposed in another person, then the case is taken out of the general rule. *Sneider vs. Gibbs.* 34

INSURANCE.

1. In a special verdict, the Court, from the circumstances of the fact found, can adjudge whether it amounts to barratry, or deviation only. *Hood et al. vs. Nesbit et al.* 141
2. All the cases of barratry include some fraud or criminal conduct in the master of the ship. 46.
3. Every circumstance must be weighed to form a judgment of the fraud or fairness which the whole transaction impresses on our minds. 46.
4. *Quere*, Whether an English merchant can recover for premiums on insurance of goods shipped, where the same has been ordered, unless he produces the policies, or accounts for their loss. *Warder vs. Craig.* 414
5. Where the voyage is lost, though the property insured be not damaged to one-half its value, the insured may abandon, and claim as for a total loss. *Fuller vs. McCall.* 464
6. But if he receives intelligence of a loss from one who is not his factor, or consignee, and acts in pursuance of it, but does not quickly and unequivocally make an abandonment, he shall not afterwards, on subsequent events, turn a partial into a total loss. 46.

INTEREST. USURY.

1. The Court will not interpose where a jury have exceeded legal interest in the measure of damages for delaying the payment of money, unless it be excessive. *Respublica vs. Le Case et al.* 55
2. A garnishee is not liable to pay interest, pending a foreign attachment. *Fitzgerald vs. Caldwell.* 274
3. On a valuation of the real estate of an intestate, the person accepting it is bound to pay interest for the distributive shares of the other children from the time of his acceptance. *Hubley, President, vs. Hamilton.* 394
4. Interest is due for the sum awarded, on a parol award. *Jones vs. Ringgold.* 480

INTESTATE. DISTRIBUTION.

1. Lands of intestate, aliened *bona fide* by the heir, are subject to the debts of the ancestor; and no descent, or distribution, in Pennsylvania, can give children an indefeasible right in the lands of the intestate, but they continue subject to the debts of the intestate. *Morris's lessee vs. Smith.* 238
2. Lands in Pennsylvania, which are intailed, descend according to the course of the common law. The act of assembly of 1705 only regulates the descent of lands among children, where the father is seized thereof, and might dispose thereof by deed or will. *Sander's lessee vs. Morningstar.* 313
3. On the valuation of the real estate of an intestate, the person accepting it is bound to pay interest for the distributive shares of the other children from the time of his acceptance. *Hubley, President, vs. Hamilton.* 392

JUDGE.

1. No man can be a judge in his own cause. Overseers of the Poor of Upper Dublin vs. Overseers of the Poor of Germantown. 251
2. A judge is not warranted in infringing on a fixed rule of decision, whatever may be his private ideas on the subject. *Todd's lessee vs. Oockerman.* 298
3. Adjudications of judges in England, since the revolution of 1776, are not equally binding on judges here, as those previous to it; but where they are founded on sound principles of law, general convenience, applicable to our local situation, and good sense, they will have weight. *Bank of North America vs. Barriere,* 363
4. No action will lie against a judge for what he does in that character. *Rose vs. Ritterhouse's executors,* 443

JUDGMENT.

1. Where proceedings between landlord and tenant are reversed on error, the Court is not bound, *ex debito justitiae*, to award restitution. *Fitch Alden vs. Lee,* 180, 207
2. Judgments in the Supreme Court, upon removals from the proper county, bind defendant's lands throughout the state. *White's executors vs. Hamilton,* 183
3. A judgment entered by way of security admits nothing; but plaintiff on trial must prove his case as laid. *Gorgerat et al vs. M'Carty,* 268

JURISDICTION.

(See Justice of the Peace.)

JURY, JUROR, VERDICT.

1. The jurors are the constitutional judges of the credit of witnesses; and if the sanity of a testator is left to them, the Court will not interpose when they have discovered no leaning. *Heister vs. Lynch*, 108
2. Where a juror has been sworn who is of kin to one of the parties, but it was not known at the time by the adverse counsel, the Court may discharge him, and swear another in his room. *Spong vs. Leasher*, 328
3. Jurors are the constitutional judges of the parties' intentions. *Campbell's lessee vs. Sproat*, 239
4. The proof of one of the jurors eating and drinking at the expense of the party for whom the verdict has gone, must be clear and full. *M'Causland's lessee vs. M'Causland*, 372
5. A juror prejudging a cause, and giving an opinion on the statement of certain facts, before the evidence is gone through, are very different things. *ib.*
6. Jurors peremptorily challenged by the prisoners on an indictment for *mayhem*, under the act of assembly of 1794. *Respublica vs. Langoake et al*, 416
7. Where a corporation are parties, or immediately interested in the question, a member of it cannot be a juror or witness. *Respublica vs. Richards*, 480

JUSTICE OF THE PEACE, JURISDICTION.

1. Where, between landlord and tenant, justices of the peace do not allow a reasonable time to the tenant to procure his testimony, the Court will set aside the proceedings. *Stewart vs. Martin*, 49
2. Justices of the peace have no right to fix their own fees. *Respublica vs. Hannum*, 71
3. They are not bound to issue their warrants whenever applied for, but should use a legal discretion. *ib.*
4. After a recognisance taken to answer for a riot, they should not issue warrants for assaults and batteries, which are overt acts of the former offense. *ib.*
5. Information will not be granted against a justice of the peace for extortion or oppression, where he has taken the usual fees, though illegal, and there has been no criminal intention. *ib.*
Justices of the peace have jurisdiction, when damages occasioned by the biting of a dog have been ascertained by reference. *Weididmor et al vs. Drissel*, 77
7. The word "demands," as to their jurisdiction, is restrained to those which arise *ex contractu* and not *ex delicto*. *ib.*
— And *Finney vs. M'Mahon*, 249
8. One indebted for rent gives a note for it—the justice has jurisdiction. *ib.* 77, 78
9. It is not to be expected of justices of the peace that they should make a return to a *certiorari* with strict legal precision. *Finney vs. M'Mahon*, 248
10. A plaintiff before a justice may waive a *tort*, and go for the money clearly due to him. *ib.*
11. Justices of the peace have always exercised jurisdiction in cases of executors and administrators, defendants; but should they proceed to re-examine an administration account, or not allow the party a reasonable time to settle one in the proper office, the Court would interpose. *Oakes vs. Robinson's executors*, 259
12. Justice of the peace cannot join in making an order of removal from his own township. *Overseers of the Poor of Upper Dublin vs. Overseers of the Poor of German-town*, *ib.*
13. Where a justice has received improper evidence, but the party might have had an appeal, and has entered into a recognisance in nature of special bail, the Court will not interfere. *Morton, assignee, vs. Flowman*, 251
14. On a recognisance before a justice of the peace, in nature of special bail, the principal cannot be surrendered by the bail, after the expiration of six months. *Speakman vs. Pearce*, 247
15. Information lies against a justice of the peace for taking the recognisance of a person charged with an assault and battery, himself in *thirty* shillings, and two sureties in *fifteen* shillings each. *Respublica vs. Burns*, 370
16. No, for not actively assisting in suppressing a riot. *Respublica vs. Montgomery*, 419
17. Return to a *certiorari* on a recovery before the mayor, in debt on a city ordinance, need not set out the same. *Carlisle vs. Baker*, 471
18. It is a fatal exception to such a recovery, that a summons has issued on two different charges, and a judgment had on one, without taking notice of the other. *ib.*

LANDS, LOCATION, WARRANT, SURVEY.

1. Courses and distances run on the ground are the true survey. The return of the deputy surveyor is only evidence thereof, and mistakes or frauds therein may be examined by parcel proof. *Lilly's lessee vs. Kitamiller*, 36

2. One entering a location in another's name, it shall be presumed to be in trust, for the use of the party applying. *Cox's lessee vs. Grant*, 164
3. Pre-emption rights to Indian lands, under the act of assembly of 21st December, 1784, are to be governed by the rules of landed property. *Duncan's lessee vs. Walker*, 213
4. The usage of the late province was, to consider improvements, and even warranted and surveyed lands, as personal property, until 1758, or thereabouts. *ib.*
5. A warrant must be judged of as it appears on the face of it; and whether it is sufficiently descriptive of, or locates precisely, the land in question, can only be determined by testimony ascertaining the local situation of the grounds, and the natural or artificial boundaries or marks contained therein. *Nesbit's lessee vs. Titus et al*, 285
6. The intention of the party is of no moment, unless it is reduced to writing in the warrant. *ib.*
7. Nor can the declarations of the secretary of the land office have any legal operation. *ib.*
8. Applications to a deputy surveyor to make a survey, and what passed thereon, are always given in evidence, because it is an act done in prosecution of the title, and tends to show that no *laches* is imputable to the party. *ib.*
9. In contests or warrant rights, it is of great moment to establish that the party's pretensions have been duly followed up, without negligence; that he has not laid idly by while surveys have been made on the lands for other persons; and that when an adverse survey has been made, he has filed his caveat in a reasonable time. *ib.*
10. The 15th section of the law passed 8th April, 1785, that no surveyor shall go out of his district to make a survey, relates solely to the lands purchased at Fort M'intosh. *Wright's lessee vs. Wells*, 286
11. Applications in the land office, after the opening of it, on the 3d April, 1786, are the expressions of wishes to hold certain lands, but merely of themselves create no right. *Blaine's lessee vs. Crawford et al*, 287
12. They are inceptions of titles when duly pursued, but form no contract on which the parties could be sued, until a survey has been made, designating the party's pretensions by metes and bounds. *ib.*
13. Where there has been negligence in obtaining a survey, a subsequent location may, by due industry, defeat the operation of a former one, as to lands which it might be disposed to describe with sufficient certainty. *ib.*
14. The maxim "*vigilantibus non dormientibus leges subserviunt*" applies strongly to rights, founded on locations. *ib.* 290
15. A *military permit* to settle and improve lands not to be regarded, unless followed by a settlement and improvement. *ib.*
16. Decision of the board of property, instituted 5th April, 1782, cannot alter the nature of a title, but it may be contested at law. *ib.*
17. Lands forfeited by the attainder of a traitor, can only be sold by the agents of forfeited estates. *ib.*
18. A location, independent of due diligence to obtain a survey, gives no right to the pre-emption of lands. *Irwin's lessee vs. Nichols et al*, 293
19. An application, or location, whereon no survey has been made, is within the meaning of the limitation act of 26th March, 1785. *ib.*
20. But fraud in the surveyor, or the adversary's preventing a survey by force, may prevent the application of the prohibitory words of the law. *ib.*
21. A settler of lands to the westward, under a *military permit*, does not lose his preference by omitting to file an application in the land office, on 3d April, 1786. *Tom's lessee vs. Ockerman et al*, 295
22. In ejectment for lands on Pine creek, under the act of assembly of 21st December, 1784, it is indispensably necessary to show in evidence that the lessor of the plaintiff had paid, or tendered, the consideration thereof to the receiver general, on or before the 1st November, 1785. *Cook's lessee vs. Eppele*, 324
23. A pre-emption warrant, granted to the plaintiff in ejectment, under the act of 21st December, 1784, though he has not been on the Pine creek lands since the commencement of the late war, shall prevail against a defendant who had not taken out his warrant until after the 1st November, 1785. *McConnel's lessee vs. Porter*, 406
24. Persons are not entitled to the pre-emption of Indian lands, under the act of 21st December, 1784, who did not occupy the same after the commencement of the war. *Hughes's lessee vs. Dougherty*, 497
25. Where a settler on the Indian lands has occupied them until the war broke out, and then enlisted as a soldier, he is within the meaning of the pre-emption act of 21st December, 1784. *Sweeney's lessee vs. Toner*, 499
26. The strict forms of conveyances have not been applied to the imperfect rights of applications in the land office; and parol evidence has been given of the sale of improvements. *Faxton's lessee vs. Price*, 500
27. Improvements on the lands within the Indian purchase shall not be given in evidence to defeat a legal title, unless the party has applied for an office right within a reasonable time. *Plumsted's lessee vs. Rudebagh*, 502
28. Claims under improvements may be deemed imperfect rights to lands, and depend on a variety of circumstances. *Howard's lessee vs. Follock et al*, 509
29. A prior improvement under Pennsylvania shall prevail against a Virginia certificate under the compact between the two states. *Smith's lessee vs. Brown*, 513
30. Between claimants under Virginia, the certificate of the commissioners is conclusive evidence; *aliter*, where one of the parties claims under a Pennsylvania right. *ib.*
31. To give an improvement any equity, it must not have the smallest cast of an abandonment. *ib.*
32. Assignment of an application for lands, without words of inheritance, for a valuable consideration, will pass an estate in fee simple. *Lynn's lessee vs. Downes*, 518

33. One guilty of laches in not endeavoring to procure a survey, on his application in the land office, shall be postponed. *Cherry's lessee vs. Robinson*, 521
34. One in possession of lands under a legal title sells to a purchaser, *bona fide*, without notice, an equitable title by improvement shall not affect him, nor be received in evidence. *ib.*
35. A warrant, survey, and patent shall refer back to the original application entered in the land office. *ib.* 523

LEASE, LESSOR, LESSEE.

1. Where a lessor claims and uses certain privileges against the lessee's consent, it is incumbent on him to show that he reserved them otherwise, he suspends the rent. *Vaughan et al. vs. Blanchard et al.*, 175
2. If lessor enters into part of the land the whole rent is suspended. *ib.*

LEGACY, LEGATEE.

1. The words "goods or moveables," in a will, may include bonds, unless there is something in the context of the whole will to restrain the construction. *Jackson vs. Robinson, executor, &c.*, 101

LEX LOCI.

(See Court—Foreign.)

LIEN.

1. Lands aliened *bona fide*, by the heir, are subject to the debts of the ancestor. *Morris's lessee vs. Smith*, 338
2. But lands aliened *bona fide*, by executors, under a proper power in a will, are not subject to the debts of the testator. *Spear vs. Hannum*, 350
— And purchaser may defend himself against future debts of testator; *aliter*, where the power is for payment of legacies, for in such case the debts continue as liens on the lands sold. *Hannum et al.*, in error, *vs. Spear*, 586
3. Debts of a testator, or intestate, are not liens on their lands, which are considered as mere *assets* in case of deficiency of their personal estate. *Spear vs. Hannum*, 380
4. As between vendor and vendee, and those claiming under the latter, with notice, the lien of the purchase money continues on the land. *Stouffer's lessee vs. Coleman*, 393
5. So, though the vendor has taken bonds for the purchase money, if there is no receipt indorsed on the agreement, or proof that they were accepted as actual payment, if he keeps possession of the title papers. *ib.*

LIMITATIONS OF ACTIONS.

1. An application, or location, whereon no survey has been made, is within the meaning of the limitation act of 26th March, 1785. *Irwin's lessee vs. Nichols*, 353
2. The act is an excellent safeguard to landed possessions, and should be construed liberally. *ib.*
3. A citizen of South Carolina is not within the saving of the act of 27th March, 1713, which is a beneficial act, and should be construed liberally. *Ward vs. Hallam*, 329
4. Neither the English statute of 21st Jac. 1, c. 16, nor the act of assembly of 27th March, 1713, prescribes any period when a suit on a bond shall be barred; but, on the principle on which those acts were passed, the law will presume payment after a certain length of time. *Penrose et al. executors, vs. King*, 344
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3. *Mandamus* will not lie to the guardians of the poor in the city of Philadelphia, to continue three of the managers to superintend the alms house and house of employment for the succeeding six months. *Respublica vs. Guardians of the Poor of the city of Philadelphia*, 476

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MASTER AND SERVANT.

1. Guardian cannot bind out his ward a servant; nor can a parent, for money paid to himself. *Respublica vs. Keppeler*, 232
2. Free negroes or mulattoes can be bound in this state as servants, only until twenty-one years of age; but those who have been bound in other states, and brought into this state, may be compellable to serve until twenty-eight years of age, according to the terms of their indentures. *Respublica vs. Jailer of Philadelphia*, 368

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3. The recording of a mortgage is a constructive notice to all the world. *Evans vs. Jones*, 172
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3. One in possession of lands under a legal title sells to a purchaser *bona fide*, without notice; an equitable title by improvement shall not affect him, nor be received in evidence. *Cherry's lessee vs. Robinson*, 521
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1. A memorandum indorsed on an account, whereby the debtor promises interest, does not operate as an extinguishment of the original debt. *Joy's lessee vs. Coesart*, 54
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1. Bond conditioned that defendant should by a certain day convey lands to plaintiff, by such deed as counsel should advise. Plea, performance, with leave to give the special matters in evidence; replication, that defendant did not convey on or before the day; rejoinder, that plaintiff's counsel did not, on or before the day, advise any conveyance; adjudged, that the defendant was bound to do the first act, and that his rejoinder was a departure in pleading. *McSherry vs. Askew*, 79

2. If the original creditor sues the garnishee, after an attachment is executed in his hands, he may plead the attachment in abatement; and plaintiff may reply that it is kept on foot by fraud, and put that matter in issue to be tried. *Fitzgerald vs. Caldwell*, 279
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3. A *mandamus* will not lie to the guardians of the poor in the city of Philadelphia, to continue three of the old managers to superintend the alms house and house of employment for the succeeding six months. *Respublica vs. Guardians of the Poor of the city of Philadelphia*, 476

POWERS.

1. Husband, before marriage, covenants with his intended wife that she may dispose of her land by will; she devises them during coverture; this shall operate as a good appointment, and her heir at law shall be bound without any legal estate being vested in trustees. *Barnes's lessee vs. Hart*, 221
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3. When aliened under a power to sell for the payment of legacies, the lien of the debts still continue; *aliter*, under a power to sell for payment of debts. *Hannum et al. vs. Spear*, in error, 553

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- And Furry vs. Stone. 136
13. Declaration filed, though not marked *de bene esse*, is no waiver of bail. *Caton vs. De Berdt et al.*, 103
 14. The practise of the Courts of Pennsylvania must govern them, as the Courts of Westminster are governed by their own. 1b.
 15. On a rule for trial, or *non pro*, the plaintiff cannot object that he has not filed his declaration. *Wynne's executors vs. Adams*, 156
 16. Where proceedings between landlord and tenant are reversed for error, the Court is not bound, *ex debito justitie*, to award restitution. *Fitch Alden*, in error, *vs. Lee*, 160, 207
 17. *Quare*, Whether a plaintiff may pocket his *distringas*; and whether he is compellable to pay the costs of the term before the action is continued, when he will not try it. *Walch's lessee vs. Baker et al.*, 171

18. The Court will not oblige the plaintiff in such case to agree to the taking of depositions, to be read in evidence, at all events. *ib.*
19. The Court will not direct a non-suit, though the evidence is not very clear with the plaintiff. *Vaughan et al. vs. Blanchard et al.* 175
20. Application for a rule for security for costs, in the case of a foreign plaintiff, is never too late unless it goes to procure delay. *Shaw vs. Wallis.* 176
21. Coverture of the plaintiff pleaded in abatement, without an *affidavit*, or probable cause shown, set aside by the Court. *Rapp vs. Elliott.* 183
22. On defendant's submission to an indictment for a libel, his *affidavit* to show the provocation he had received in order to mitigate the fine, refused by the Court. *Respublica vs. Askew.* 186
23. Where the damages found by the jury exceed those laid in the declaration, the Court will allow a *remittitur* to be entered for the excess, after error brought. *Furry vs. Stone.* *ib.*
24. R devises certain lands to his widow for life, remainder to his two children; the widow and children mortgage the lands, which are sold under a *levast facias*. The widow shall be allowed to take the surplus money out of Court on giving security for the payment of the principal sum after her death. *Bloomfield vs. Budden.* 187
25. When a party moves for an information he must enter into a recognisance for the payment of costs; *aliter*, if the attorney general moves the rule officially. *Respublica vs. Prior.* 206
26. On the rule to show cause, the oaths of defendant and his witnesses must be reduced to writing. *ib.*
27. A judgment entered by way of security, admits nothing; but the plaintiff must prove his case as laid. *Gorgerat et al. vs. M'Carty.* 208
28. A non-suit, for want of testimony on the part of plaintiff, cannot be taken off. *ib.*
29. The trial of a cause shall not be postponed for the non-attendance of a witness whose deposition has been taken, where the adverse party agrees it shall be read in evidence. *Bond's lessee vs. Hunter.* 224
30. Where the plaintiff has issued his *distringas*, and given notice of trial, the defendant is not bound, under his *distringas* by *proviso*, to give notice of trial. *Peelet's lessee vs. Hess.* 302
31. The defendant in ejectment, by the practice in Pennsylvania, is not entitled to the reply, where the plaintiff, claiming by descent, proves his pedigree, and stops; and the defendant sets up a new case in his defense, which is answered by evidence on the part of the plaintiff. *M'Causland's lessee vs. M'Causland et al.* 304
32. Judges will not alter the practice at *Nisi Prius*, for then the rules of practice might vary on the different circuits. *ib.*
33. Where no declaration has been filed in the plaintiff's life, and the suit has been continued after his death, under the act of assembly of 13th April, 1791, it must be filed in the names of the original parties. *Clow and Cay vs. Brown et al.* 324
34. Inquisitions on writs, in the nature of writs of *ad quod damnum*, issued under the act of 29th September, 1791, will not be set aside, because the canal company had not offered to agree with the owners of the land, where it appears that they combined in a body against the work itself; attended the striking of the jury; showed their lines to the jury, and made preparations for their coming. *Schuykill and Susquehanna navigation vs. Diffebach et al.* 367
35. The practice of the Orphans' Court, in the western counties, in taking off the interest from the distributive shares of children on a valuation of the real estate of an intestate, until the time by them limited for the payment, is fundamentally illegal and bad. *Hubley, President, vs. Hamilton.* 393
36. The Court will not permit the depositions of witnesses to be taken out by the jury, unless by the consent of the adverse counsel. *Arwin's lessee vs. Bisbing.* 400
37. Whoever supports the affirmative of an issue has a right to begin and conclude to the jury. *Delaney vs. Regulators of Philadelphia.* 403
38. On issuing *subpoenas* in cases of divorce, a rule may be made to take depositions before the return thereof. *Anonymous.* 404
39. Where the Court have no doubts, they will not reserve a point nor direct a verdict to be entered for the plaintiff subject to this reserved point, where their opinions are for defendant. *Cheesman's lessee vs. Wilt.* 411
40. Non-suit set aside because the judge who tried the cause refused a deed in evidence which respected the same lands, and was duly proved. *Bioren's lessee vs. Keep.* 440
41. Applications for a rule to stay proceedings must be made in bank. *Plumsted's lessee vs. Rudebagh.* 502
42. Where a variance appears between the declaration and *distringas*, the Court will discharge the jury. *Boyd vs. Baggs et al.* 505
43. Application for leave to amend the *narr.* in ejectment cannot be made at *Nisi Prius*. *Howard's lessee vs. Pollock.* 509
44. But declaration altered to make it conformable to the record after the jury sworn. *Smith's lessee vs. Brown.* 513
45. After three trials in ejectment, the Court will stay proceedings. *Cherry's lessee vs. Robinson.* 521
46. The counsel who moves for a new trial should begin and conclude the argument. *Messier vs. Amery.* 533
47. Where there is reason to believe that a bond has been given to defeat creditors, the Court will decree an issue to try the validity of the bond and quantum of the debt. *M'Neal vs. Smith.* 552

PRIVILEGE.

1. Privilege of a suitor does not hold in the case of judicial process. *Hannum vs. Askew*. 25
2. Nor of a soldier, under the act of assembly of 2d January, 1778. *Wright vs. Quinn*. 163
3. Attorney at law has privilege of being exempted from the offices of overseer of the poor, supervisor of the public roads, and constable; but not from arrests or militia duty. *Respublica vs. Fisher et al.* 350

PRIZE.

(See Admiralty.)

PROFERT.

(See Oyer.)

PROMISSORY NOTE.

1. What is reasonable time of notice to be given to an indorser of a note, of its being dishonored, is now settled to be matter of law. *Bank of North America vs. M'Knight*. 145
2. But the strictness required in England has not obtained here; nor are protests absolutely necessary. *ib.*
3. Where a promissory note has been indorsed after it became due, it amounts to an original undertaking, as a note newly drawn by the indorsee. *Bank of North America vs. Barriere*. 360
4. If the payee of a note pays the balance thereof to an indorsee under a judgment against him, after the bankruptcy of the maker, and after such indorsee has procured his dividends from the assignees, by the direction of the payee, *quoad*, if he can recover against the maker, notwithstanding his bankruptcy and certificate. *Austin et al. vs. Slough*. 524

PURCHASE, PURCHASER.

1. A purchaser, with notice of a previous agreement between grantor and another, takes the land subject to the agreement. *Simon's lessee vs. Gibson et al.* 291
 2. As between vendor and vendee, and those claiming under the latter, with notice, the lien of the purchase money continues on the lands. *Stouffer's lessee vs. Coleman*. 393
 3. So, though vendor has taken bonds for the purchase money, and there is no receipt indorsed on the agreement, or proof that they were accepted as actual payment, if he keeps possession of the title papers. *ib.*
 4. One in possession of lands under a legal title sells to a purchaser, *bona fide*, without notice; an equitable title by improvement shall not affect him, nor be received in evidence. *Cherry's lessee vs. Robinson*. 521
 5. *Its pendens* is a sufficient notice to a purchaser. *Walker vs. Buts*. 574
- [Property not changed by sale in market overt, 476.]

REFEREES, REFERENCE, RULE OF, REPORT.

1. Under the depreciation act, the original source of the demand must be recurred to by the auditors. *Lee vs. Biddle*. 8
2. But on a report under that act the Court will not receive evidence of the value of the property sold. *ib.*
3. The auditors have full power to make allowance for vexatious conduct in the defendant. *ib.*
4. Report, finding that defendant should make a certain deed, or pay a sum of money; by filing exceptions thereto he waives his election. *Brown, executor, vs. Young*. 76
5. Referees not to be examined as to what proof was made to them of a tender of continental money; how or when it was made; or in what kind of money. *Wade vs. Gallagher*. 77
6. They may be examined as to a simple point; but to go further would supersede the use of referees. *ib.*
7. Ejectments may be submitted by rule of reference, and where the report is for plaintiff, but finds no costs, they shall be awarded. So, the report is good, though no damages be found in ejectment. *Harvey, in error, vs. Austin's lessee*. 156
8. Rule of reference must be deemed to continue until discharged, either by consent or rule of Court. *Grubb vs. Grubb's executors*. 193
9. Where the referees have proceeded to examine the witnesses, though they have not agreed on their report, defendant cannot remove the cause; a *multo fortiori*, when they have agreed on it. *ib.*
10. Full costs may be given by referees on a removal by plaintiff, when damages have been found under fifty pounds. *Cornogg vs. Cornogg's executors*. 202

11. The Court will not appoint auditors under the depreciation act of 3d April, 1781, unless it appears that the contract arose between 1st January, 1777, and 1st March, 1781. *Robb vs. McCune (M'Ewen)*. 352
12. Where referees or arbitrators have been guilty of gross injustice, or have made a plain mistake, the Court will interpose; but the injustice, or error, must be clearly and satisfactorily proved. *Wiloff et al. vs. Cox et al.* 353

RENT.

1. Where a landlord claims and uses certain privileges against the tenant's consent, it is incumbent on him to show that he reserved them, otherwise he suspends the rent. *Vaughan et al. vs. Blanchard*. 175
2. If lessor enter into part of the lands, the whole rent is suspended. 175

RIOT.

1. Information will lie against a justice of the peace for not actively assisting in suppressing a riot. *Respublica vs. Montgomery*. 419
2. It is the duty of every citizen to endeavor to suppress a riot, and when rioters are engaged in treasonable practices, the law protects other persons in repelling them by force. 419

ROADS.

(See Ferry.)

SALE OF GOODS. BILL OF SALE.

1. Bill of sale may be made of a ship at sea or in port, provided the vendee reduces her into possession as soon as he conveniently can. *Morgan's executors et al. vs. Biddle*. 3
2. Possession need not be taken of the ship immediately on her coming into port. 175
3. Goods may be stopped by the shipper *in transitu* only where they have not been paid for, or where the party is insolvent, but not where they have been shipped to pay a precedent debt. *Wood vs. Roach et al.* 177
4. No markets overt in Pennsylvania for the sale of goods. *Hosack vs. Weaver*. 478
5. A contract for goods prohibited by law is void; and the buyer shall not be liable in an action for the price. *Condon vs. Walker*. 483
6. On a contract of sale of goods, the property is immediately invested out of the vendor, unless it be otherwise agreed; and even then the vendor may, by his conduct, renounce the benefit of the conditions stipulated. *Leedom vs. Phillips*. 547

SERVANT.

(See Master and Servant.)

SET-OFF.

(See Defalcation.)

SHIP (MASTERS AND OWNERS OF).

1. Protest of the captain of a ship must be made at the first port where he arrives after the vessel's misfortune; otherwise it shall not be received in evidence. *Boyce vs. Moore*. 201
2. The exceptions to this rule must be satisfactorily proved. 1b.
3. An action will not lie by a shipper of goods to be transported beyond sea, against the consignee of a vessel, on a disappointment of the voyage, if he knew the vessel belonged to a foreign house; *alter*, against the owners or captain. *Joyce vs. Sims*. 409

STATUTES.

(See Act of Parliament.)

SUBPENA.

Subpoena, with a *dues tecum*, cannot issue to the surveyor general, or other public officers, to bring original papers into Court, whereof certified copies would be evidence. *Delaney vs. Regulators of Philadelphia*. 408

SUMMARY PROCEEDINGS.

1. Court will narrowly examine the summary proceedings of justices of the peace. *Stewart vs. Martin*, 40
2. Summary proceedings under a special authority cannot be too closely investigated. *Gilbert's lessee vs. Probst*, 300

SUPREME COURT.

- | | | |
|----|---|-----|
| 1. | Supreme Court will not punish the contempt of another Court. Penn's lessee vs. Mes- | 2 |
| | singer, | |
| | _____ And Second street road continued, | 155 |
| 2. | They will not compel commissioners of bankrupt to give a certificate of conformity, | |
| | though they should differ from the commissioners. Republica vs. Clarkson et al. | 46 |
| 3. | They will narrowly examine the proceedings of justices of the peace, and call in the aid | |
| | of affidavits, if necessary. Stewart vs. Martin, | 40 |
| 4. | Supreme Court will not issue a <i>mandamus</i> to the county commissioners to pay for the | |
| | valuation of ground taken up by a road, under an order of the sessions. Second street | |
| | road continued, | 155 |
| 5. | Judgments in the Supreme Court, upon removals from the proper county, bind defend- | |
| | ant's lands throughout the state. White's executors vs. Hamilton, | 183 |
| 6. | Summary proceedings, under a special authority, cannot be too minutely or closely in- | |
| | vestigated by the Court. Stewart vs. Martin, | 49 |
| | _____ Cox's lessee vs. Grant, | 164 |
| | _____ Gilbert's lessee vs. Probst, | 300 |
| 7. | The constitution of the state justifies the Court's adoption of chancery maxims and | |
| | powers. Wikoff et al. vs. Cox et al. | 358 |

SURVEY.

(See Lands.)

TAXES.

1. The sale of lands by county commissioners, where there is a sufficient personal property to be found on the premises to pay the taxes, is void, and their deed a mere nullity; and Courts of justice will examine such sales narrowly. *Coxe's lessee vs. Grant*, 164

TREASON.

1. Lands forfeited to the state by an attainder of treason must be sold by the agent of forfeited estates. *Blaine's lessee vs. Crawford et al.* 287
2. If held in fee tail, they are forfeited only during the life of tenant in tail, and until his issue shall be extinct. *Evans's lessee vs. Davis,* 332

TRESPASS.

1. Trespass is founded on possession, and may be maintained, though the party has assigned his right to another. *Fenn vs. Sillie*, 154
2. After a recovery in ejectment, and the lessor has conveyed "all his right, title, interest, claim, and demand" to the tenant, he may maintain a suit for mesne profits. *ib.*
3. Where the injury is immediate, trespass lies, but where it is consequential or collateral, case lies. *Le Gaux vs. Feasor*, 586

TRIAL-NEW TRIAL

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|---|-----|
| 1. New trial granted in ejectment, where verdict was given for defendant against law, and the direction of the Court. <i>Ross and Vaughan's lessee vs. Kason,</i> | 14 |
| 2. A trial will not be ordered on, where a party has not prepared, expecting a compromise from the declaration of his adversary. <i>Cornogg vs. Cornogg's executors,</i> | 18 |
| 3. A discovery of a material witness in another state will, under special circumstances, be a ground to put off the trial. <i>Campbell's lessee vs. Sproat,</i> | 20 |
| 4. Where the state affects delay, the Court will assign a day for the trial of the cause. <i>Bea-publica vs. Coates,</i> | 35 |
| 5. The Court will not grant a new trial because the jury have exceeded legal interest in the measure of damages for delaying the payment of money, unless it be excessive. <i>Le Case vs. Mallet,</i> | 55 |
| 6. Notice in writing of an intended motion for a new trial is indispensably necessary, ten days before the term. <i>Galloway vs. Negle.</i> | 103 |
| — And Furry vs. Stone. — | |
| | 186 |

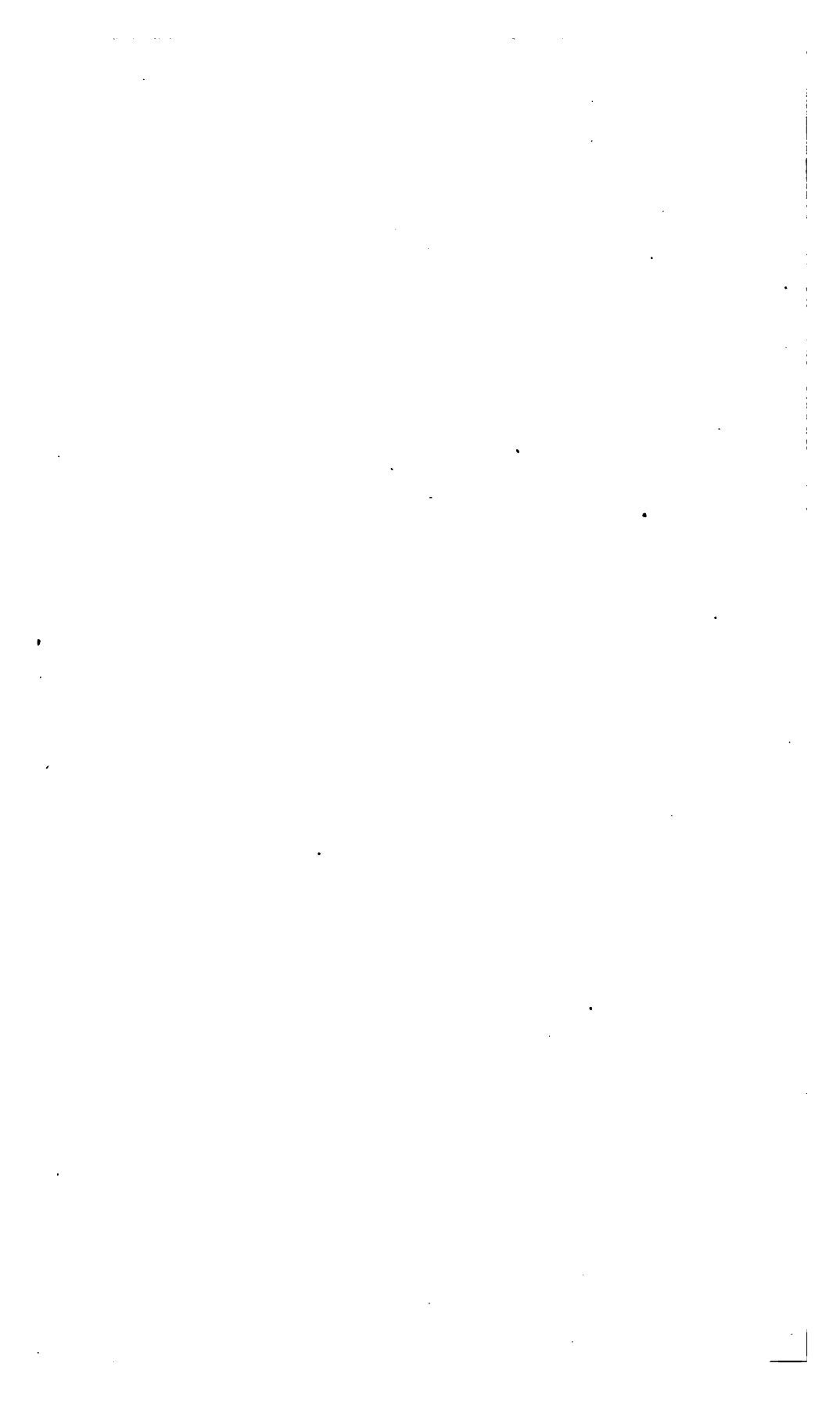
1. Construction of wills must depend on the intention of testator. *Englefriedt vs. Woelpart et al.* 45
2. Will proved before the register, or under a feigned issue, has always been received as evidence; but such probate is not conclusive evidence of a devise of land. *Walmesley's lessee vs. Read,* 87
3. Where special instructions for drawing a will are proved by two witnesses, and a will is drawn conformable thereto in the testator's life-time, though he does not execute the same, it is a good will in writing, under the act of assembly of 1705. *ib.*
4. The words "goods or moveables," in a will, may include bonds, unless there is something in the context of the whole will to restrain the construction. *Jackson vs. Robinson, executor,* 101
5. On a feigned issue to try the validity of a will, the Court before whom it is tried, and not the register, has the power to award a new trial. *Heister vs. Lynch,* 108
6. No very great share of reason is necessary to validate a will. *ib.*
7. Will of a feme covert, in pursuance of an agreement made with her husband before marriage, may dispose of her personal estate, but not of her lands, at law. *Barnes's lessee vs. Hart,* 221, 225
8. Husband, before marriage, covenants with his intended wife that she may dispose of her lands by will; she devises them during coverture; this shall operate as a good appointment, and her heir at law shall be bound without any legal estate being vested in trustees. *ib.*
9. In construing a will, no word is to be rejected which is not repugnant to the general intent. *Griffiths's lessee vs. Woodward,* 319
10. Courts are warranted to give that effect to the will which will best answer the devisor's general intention, though by so doing some particular intention may be defeated. *Evans's lessee vs. Davis,* 342
11. Wherever a testator uses proper technical expressions, Courts are bound to say he understood the meaning of each, and they cannot substitute one for the other, unless by unavoidable and necessary construction, to make sense of the will. *ib.*
12. Testator directs lands to be sold, and the moneys distributed, but appoints no one to sell; a sale by the surviving executor is good. *Lloyd's lessee vs. Taylor,* 422
13. The written words of a will shall not be supplied, contradicted, or explained by parol evidence. *Torbert vs. Twining,* 423
14. The construction of a will must be, *ex vicceribus suis.* *ib.*
15. Intention of testator must be gathered from the words of his will, taken altogether. *Lynn's lessee vs. Downes,* 518

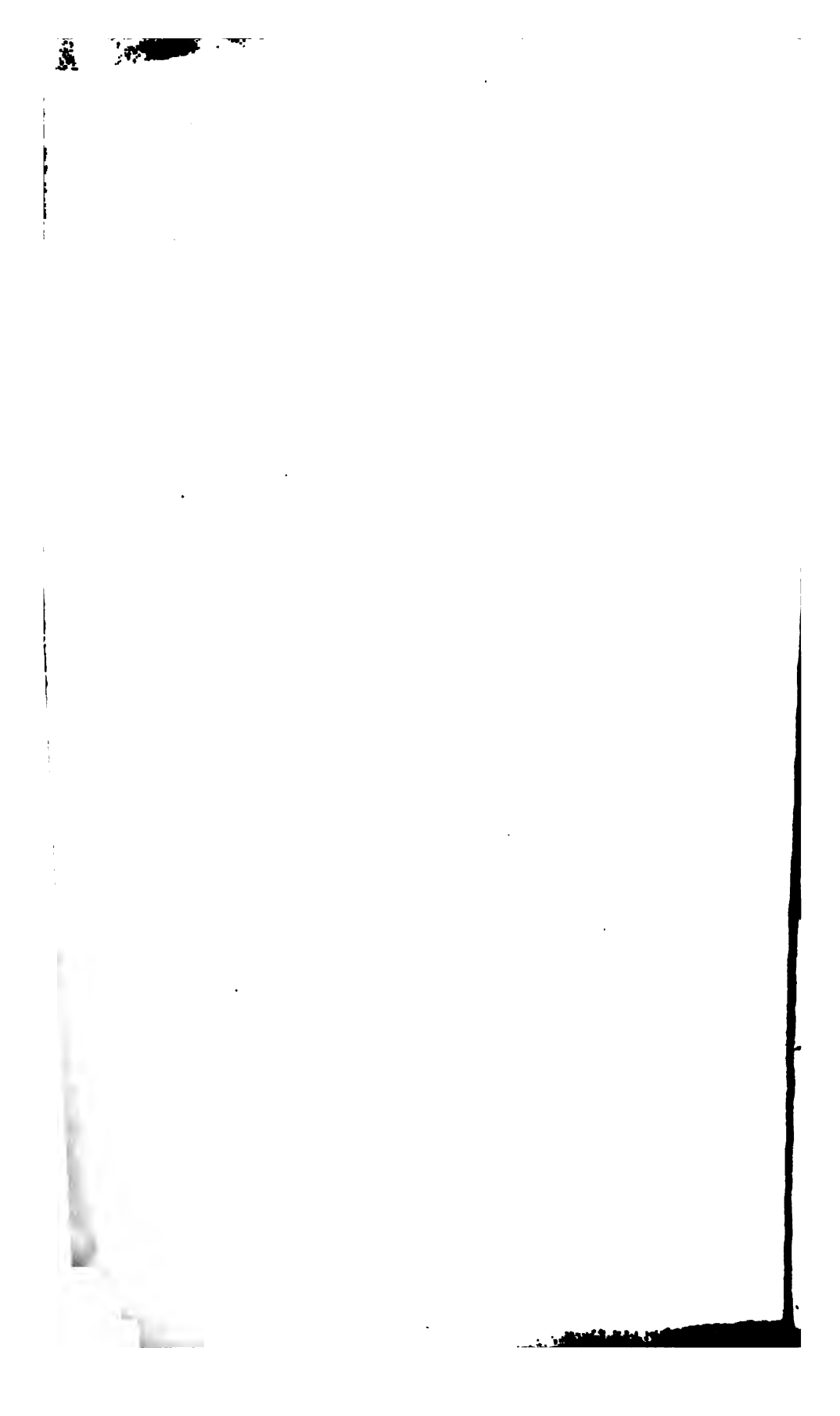
WITNESS.

1. A party allowed as a witness to prove the irregularity of a judgment, the service of a subpoena, or the inability of a witness to attend. *Douglas's lessee vs. Sanderson.* 15
2. So, to prove that he had searched for the subscribing witness to a deed; or other collateral matter. *ib.*
3. A party interested will be admitted a witness for the sake of trade and the common usage of business. *Miller vs. Hayman.* 23
4. So, an agent, factor, or attorney, bidding for another, may prove his own power. *ib.*
5. One of the vendors of cattle, who is equally liable to both parties in replevin, allowed to give evidence. *Miller vs. Little.* 26
6. A release to a person otherwise interested will make him a competent witness. *Lilly's lessee vs. Kitzmiller.* 28
7. In a suit against an innkeeper, for money lost in his house, *quæra*, if the plaintiff may not prove, by his own oath, the contents of a bag delivered to be kept for him. *Sneider vs. Gelsa.* 34
8. Objection to a witness where the matter is doubtful shall be restrained to his credit. *Cornogg vs. Cornogg's executors.* 84
9. A witness who has no decided interest in the event of the cause shall be received. *ib.*
10. One shall not be a witness to disaffirm his own contract. *Clyde vs. Clyde.* 92
11. A plaintiff is not admitted a witness to substantiate his demand to a jury, though he should be an executor, or an agent for another, and should offer to lodge the costs in Court. *Field et al. vs. Biddle.* 134
12. In a suit against partners, one of the defendants, though willing, cannot prove the partnership, if thereby he would exonerate himself of part of a partnership debt. *Miller vs. McClenahan et al.* 144
13. A guardian who has signed a receipt for 4000 continental dollars in 1780, may, under a release from his ward, be a witness to prove what passed at and immediately before the subscription of the receipt. *Pleasants vs. Pemberton.* 202
14. Vendor of lands, allowed as a witness, under a release, though the date of the deed was not specified therein. *Tod's lessee vs. Ockerman.* 205
15. A party interested allowed as a witness to the Court to inform their consciences as to a collateral fact. *Schuykill and Susquehanna navigation vs. Diffebagh et al.* 367
16. On an indictment for uttering and publishing a forged deed, knowing the same to be forged, the party injured is a competent witness. *Respublica vs. Wright.* 401
17. Where a corporation are parties, or immediately interested in the question, a member of it cannot be a juror or witness. *Respublica vs. Richards.* 480
18. Release to a baron and feme, to enable her to give testimony in the absence of baron, is good. *Bioren's lessee vs. Keep.* 576

WORDS.

1. Or construed *and* to effectuate testator's intention. *Englefried vs. Woelpart et al.* 41
2. "Legal representatives" are equivocal in themselves, and may be referable either to "heirs, executors, or administrators," according to the subject matter. *Duncan's lessee vs. Walker.* 230
3. The word "exclusive" construed "over and above," to effectuate the plain intention of the jury. *Walker vs. Gibbs.* 235
4. Courts of justice will transpose the clauses of a will, and construe *or* to be *and*, and *and* to be *or*, only in such cases where it is absolutely necessary so to do, to support the evident meaning of the testator. *Griffith's lessee vs. Woodward et al.* 319





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